No. 2257

United States
Circuit Court of Appeals
For the Ninth Circuit.

LESTER TURNER, SUTCLIFFE BAXTER and EDGAR AMES, as Trustees of WESTERN STEEL CORPORATION, Bankrupt,

Appellants,

vs.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

Records of U.S. Circuit
Court of Appeals
F12

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Counsel.

Messrs. MUNN & BRACKETT, Attorneys for Trustees and Appellants,
803 Alaska Building, Seattle, Washington.

Messrs. BAUSMAN & KELLEHER, Attorneys for Metropolitan Trust Company, Claimant,
1408 Hoge Building, Seattle, Washington.

[3*]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

Trustees' Objections to Claims of Metropolitan Trust Company.

To the Honorable JOHN P. HOYT, Referee in Bankruptcy, come now your trustees, Lester Turner, Sutcliffe Baxter and Edgar Ames, and present the following facts:

I.

That on or about the 1st day of April, 1910, the bankrupt executed a certain Mortgage Trust Deed, covering certain real and personal property of the bankrupt, for the purpose of securing an issue of bonds in the sum of Two Million Dollars ($2,000,000.00). That in the said Mortgage Trust

*Page-number appearing at foot of page of original certified Record.

Deed the Carnegie Trust Company and Lawrence A. Ramage were named as trustees. That on or about the first day of June, 1911, the Metropolitan Trust Company of New York City became the trustee under said Mortgage Trust Deed by substitution.

II.

That on or about December 1, 1910, Metropolitan Trust Company of New York City loaned to the bankrupt the sum of Three Hundred Thousand Dollars, and on April 1, 1911, loaned to the bankrupt the additional sum of Three Hundred Thousand Dollars ($300,000.00), taking the note of the bankrupt in the sum of Six Hundred Thousand [4] Dollars ($600,000.00), covering all advances. That as a condition to the making of the said advances, Metropolitan Trust Company required the substitution of itself as trustee under the said Mortgage Trust Deed in place of Carnegie Trust Company and Lawrence A. Ramage. That since the making of the said advance of December 1, 1910, the said Metropolitan Trust Company has assumed to act and has acted as trustee under the Mortgage Trust Deed, as aforesaid.

III.

That the whole of the said Two Million Dollar ($2,000,000) bond issue was deposited by the bankrupt with said Metropolitan Trust Company as trustee, and the said issue was pledged to the said Metropolitan Trust Company to secure the said Six Hundred Thousand Dollars advanced by it.

IV.

That thereafter, on or about the 29th day of Au-

gust, 1911, the said Metropolitan Trust Company, without any sufficient notice, caused the said Two Million Dollar bond issue to be offered for sale at public auction in foreclosure of its said pledge, and caused the said bonds to be bought in by itself for the sum of Twenty-five Thousand Dollars ($25,000.00). That the amount for which the said bonds were sold was wholly inadequate and insufficient to vest in said Metropolitan Trust Company the ownership of the said bonds, with the right to enforce the same to the full amount.

V.

That Metropolitan Trust Company has filed herein its claim as an unsecured creditor in the sum of Five Hundred Eighty-two Thousand Nine Hundred Fifty-three Dollars ($582,953.00), with interest [5] at the *reat* of six per cent (6%) from August 31, 1911. That the said claim is based upon the said note of the bankrupt in the sum of Six Hundred Thousand Dollars ($600,000.00), dated April 1, 1911. That a copy of said note is attached to the said Proof of Claim. That the said Proof of Claim declares that the bonds pledged to secure the said note have been sold and the proceeds applied in reduction of the amount due upon the said note.

VI.

That in addition to the foregoing Proof of Claim upon the said note, the Metropolitan Trust Company has filed herein its Proof of Claim upon the said Two Million Dollars ($2,000,000.00) of first mortgage bonds, with interest thereon in the sum of One Hundred Sixty-seven Thousand Five Hundred Dol-

lars ($167,500.00), demanding that its claim for that amount be allowed and that the Mortgage Trust Deed be allowed as a lien to the full amount of the bonds upon the properties covered by the said Mortgage Trust Deed.

VII.

That at a creditors' meeting duly called for the purpose of considering in what manner the assets of the bankrupt's estate should be disposed of, an order was entered on the 17th day of February, 1912, directing all the assets of the bankrupt covered by the said Mortgage Trust Deed, together with other assets, to be offered for sale on March 15, 1912. That by the said order it was adjudged that Metropolitan Trust Company was the owner of the said Two Million Dollars ($2,000,000.00) first mortgage bonds, and that upon the said sale it should be allowed to use the same in bidding and paying for the assets covered by the said Mortgage Trust Deed to the full face value thereof, on condition, however, [6] that the said Metropolitan Trust Company should deposit the said bonds, together with certain shares of stock in Western Coal & Iron Company, Ltd., with the referee and trustees respectively, and provided, further, that any creditor or other person aggrieved by the entry of said order, respecting the use of the said bonds, might file his petition contesting the right of said Metropolitan Trust Company to use said bonds in bidding and paying for the said assets to their full face value, and that upon the hearing of any such petition, the referee might modify the said order in respect to the use of the said bonds in any manner which law, jus-

tice and equity might require.

VIII.

That pursuant to said order, the said bonds were deposited with the referee and are now in the custody of the referee. That within the time prescribed in the said order, The First National Bank of Seattle, Washington, The Bank of Vancouver, of Vancouver, Province of British Columbia, and Standard Oil Company of New Jersey, filed herein their petition contesting the right of Metropolitan Trust Company to use said bonds in the manner prescribed in said order of February 17, 1912, and upon the said petition a hearing was had, the matter fully argued, and on March 2, 1912, an order entered by the referee herein finding that the proceedings taken by Metropolitan Trust Company in the foreclosure of its pledge were legally insufficient to vest in it as purchaser the ownership of the said Two Million Dollars ($2,000,000.00) of bonds, discharged of its trust obligation, to hold the same as security under the pledge, and modifying the order of February 17, 1912, by limiting the amount to which the said bonds might be used in bidding and paying for the assets covered by the said Mortgage Trust Deed to the sum [7] of Six Hundred Fifty Thousand Dollars ($650,000.00).

IX.

That at the said sale held on March 15, 1912, the highest and best bid for the assets covered by the said Mortgage Trust Deed was the bid of Metropolitan Trust Company in the sum of Six Hundred Forty-seven Thousand Ten Dollars ($647,010.00), which bid was accepted by the trustees herein. That

by order entered on the 20th day of March, 1912, the said bid was approved, the sale confirmed and the trustees ordered to make conveyance upon the receipt of the amount bid in cash and the tender of said bonds for indorsement, as provided in the said Order of Sale, as modified. That pursuant to the said Order of Confirmation, your trustees have received from Metropolitan Trust Company the amount bid by it in cash, and have made conveyance of all properties covered by its said bid.

X.

That inasmuch as the proceedings taken by Metropolitan Trust Company in the foreclosure of its pledge were legally insufficient to vest in it title to said bonds, discharged of its trust obligation to hold the same as a pledge, securing the original loan of Six Hundred Thousand Dollars ($600,000.00), and inasmuch as Metropolitan Trust Company in bidding and paying for the properties covered by said Mortgage Trust Deed has enforced the said bonds and received value thereon in the sum of Six Hundred Forty-seven Thousand Ten Dollars ($647,010.00), which amount is in excess of the principal and interest due upon the said pledge obligation, it would be unjust and inequitable for the said Metropolitan Trust Company to receive further profit or advantage from [8] said original note of April 1, 1911, or from said bonds.

WHEREFORE, your trustees petition that a citation issue requiring Metropolitan Trust Company to appear and show cause why the said claims filed by it should not be rejected and the evidences of the same,

to wit, the note of the bankrupt dated April 1, 1911, in the sum of Six Hundred Thousand Dollars ($600,000.00) and the Two Million Dollars ($2,000.-000.00) of First Mortgage Bonds of the bankrupt should not be surrendered up to the trustees and by them cancelled.

MUNN & BRACKETT,
Attorneys for Trustees.

United States of America,
State of Washington,
County of King,—ss.

Lester Turner, being first duly sworn, deposes and says that he is one of the duly appointed, qualified and acting trustees of Western Steel Corporation, Bankrupt; that he has read the foregoing petition, knows the contents thereof and believes the same to be true.

LESTER TURNER.

Subscribed and sworn to before me this 25th day of March, A. D. 1912.

[Seal] S. M. BRACKETT,
Notary Public in and for the State of Washington, Residing at Seattle.

[Indorsed]: Trustees' Objections to Claims of Metropolitan Trust Company. Filed in the United States District Court, Western Dist. of Washington, April 15, 1912. A. W. Engle, Clerk. By B. O. Wright. Filed March 26, 1912, 2 P. M. John P. Hoyt, Referee. [9]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

Order of Referee upon Trustees' Objections to Claims of Metropolitan Trust Company.

The trustees in the above bankruptcy proceedings having heretofore filed their objections to the claims of Metropolitan Trust Company, and their petition in said matter and a Citation having issued to Metropolitan Trust Company and Bausman & Kelleher, its attorneys, requiring said Metropolitan Trust Company to appear before the Referee in said bankruptcy proceedings at two o'clock P. M. on Friday, the 29th day of March, 1912, and then and there to show cause why an Order should not be entered by the Referee, requiring said Metropolitan Trust Company to surrender up to the trustees in bankruptcy for cancellation a certain note of the bankrupt, dated on or about April 1st, 1911, in the sum of Six Hundred Thousand Dollars ($600,000.00), payable to Metropolitan Trust Company, and certain bonds of the bankrupt in the possession of the said Referee in an aggregate sum of Two Million Dollars ($2,000,000.00) par value, and to show cause why the said claims of said Metropolitan Trust Company, based upon said note and bonds, should not be re-

jected, and the hearing upon said objections and said Citation having been regularly adjourned to the hour of ten o'clock A. M., on April 1st, 1912, the objectors, The First National Bank of Seattle, being present in court by its attorneys, Messrs. Hughes, McMicken, Dovell & Ramsey, and The Bank of Vancouver being [10] present in court by its attorneys, the Metropolitan Trust Company being present in court by its attorneys, Messrs. Bausman & Kelleher, and the trustees in bankruptcy being present in court by their attorneys, Messrs. Munn & Brackett, and there having been offered in evidence all the records and files in said bankruptcy proceedings, and by stipulation of the parties there having been considered by the referee the testimony heretofore introduced and considered by the referee at the hearing before said referee on the 9th day of March, 1912, which said hearing is referred to in the Modified Order of Sale entered herein on March 12th, 1912, and the Referee being in all respects fully advised, and the Referee finding that the bonds of the bankrupt were sold by said Metropolitan Trust Company, and by it purchased in the foreclosure of the pledge agreement without any fraudulent intent upon the part of Metropolitan Trust Company, but that the procedure followed by the Metropolitan Trust Company was legally insufficient to vest in it the legal title to said bonds, discharged of its trust obligation to hold the same as pledgee as security for the original amount loaned by it to the bankrupt, to wit, the sum of Six Hundred Thousand Dollars ($600,000.00), together with interest and expenses; that under the Orders of

Sale entered herein and according to the bid of said Metropolitan Trust Company, it has paid for the assets and property of the bankrupt covered by the mortgage securing the bonds of the bankrupt the sum of Six Hundred Forty-seven Thousand Ten Dollars ($647,010.00) in bonds of the bankrupt, and that said sum is equal to the total amount of the indebtedness of the bankrupt to said Metropolitan Trust Company evidenced, as aforesaid, by said note for Six Hundred Thousand Dollars ($600,000.00),

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the note [11] of the bankrupt in the sum of Six Hundred Thousand Dollars ($600,000.00), dated April 1st, 1911, and payable to Metropolitan Trust Company, and now in the possession of the Referee herein, be surrendered up to the trustees in bankruptcy for cancellation; that said note shall be cancelled by having written, indorsed or stamped thereon by said trustees, "Cancelled under terms of Order of Referee entered April 1st, 1912."

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the bonds of the bankrupt executed under date of October 1st, 1910, in favor of Carnegie Trust Company and Lawrence A. Ramage, trustees, of which bonds the Metropolitan Trust Company and James F. McNamara have become the substituted trustees, to wit, an issue of two thousand bonds of the par value of One Thousand Dollars ($1,000.00) each, being in the aggregate sum of Two Million Dollars ($2,000,000.00) of face value be surrendered up to the said trustees in bankruptcy

for cancellation, and that said bonds be cancelled by having written, indorsed or stamped on each of them, "Cancelled under terms of Order of Referee entered April 1st, 1912."

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the claims of the Metropolitan Trust Company based upon said note and said bonds be rejected in so far as the same exceed the purchase price aforesaid of said properties.

Witness my hand this 1st day of April, 1912.

JOHN P. HOYT,
Referee in Bankruptcy.

[Endorsed]: Order of Referee upon Trustees' Objections to Claims of Metropolitan Trust Company. Filed Apr. 1st, 1912, 2 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Apr. 15, 1912. A. W. Engle, Clerk. By B. O. Wright, Deputy. [12]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

Petition for Review of Order of Referee upon Objections to Claims of Metropolitan Trust Company Made and Entered April 1st, 1912.

To JOHN P. HOYT, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows as follows:

It is a creditor of Western Steel Corporation, the bankrupt above named, and its claim has been heretofore duly filed and allowed herein.

On the first day of April, 1912, an order was made and entered herein directing that the note of the bankrupt, in the sum of Six Hundred Thousand Dollars ($600,000.00), dated April 1, 1911, and payable to Metropolitan Trust Company of the city of New York, and first mortgage bonds of the bankrupt of the par value of Two Million Dollars ($2,000,000.00), be surrendered to the trustees in bankruptcy for cancellation, and that the claim of the Metropolitan Trust Company of the city of New York, based upon said notes and said bonds, be rejected in so far as the same have not been used in paying for the properties of this bankrupt, purchased by the Metropolitan Trust Company of the city of New York.

Said order is erroneous in fact and in law in its findings that the procedure followed by the Metropolitan Trust Company was legally insufficient to vest in it the legal [13] title to said bonds, discharged of its trust obligation to hold the same as pledgee as security for the original amount loaned by it to the bankrupt, and that Six Hundred and Forty-seven Thousand and Ten Dollars ($647,010.00)

is equal to the total amount of the indebtedness of the bankrupt to the Metropolitan Trust Company, and is erroneous in law in that it orders that said note and bonds be canceled, and that the claim of the Metropolitan Trust Company thereon be rejected, and in that it fails to allow the claims of the Metropolitan Trust Company as heretofore filed herein, in full.

WHEREFORE your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed by the District Judge as provided by the Bankrupt Laws of the United States of General Order XXVII.

Dated this 9th day of April, 1912.

METROPOLITAN TRUST COMPANY
OF THE CITY OF NEW YORK.
By BAUSMAN & KELLEHER,
Its Attorneys. [14]

United States of America,
Western District of Washington,
County of King,—ss.

Frederick Bausman, being first duly sworn, on oath says: That he is one of the attorneys for the petitioner in the above-entitled action; that he has read the foregoing petition for review, knows the contents thereof and believes the same to be true; that he makes this affidavit because no officer of Metropolitan Trust Company is nearer to the place of holding of this court than the city of New York; that there is not sufficient time to obtain the verification of any officer of said company within the time fixed by this Court for the filing of this petition, and

that the matters stated therein are personally known to affiant, who makes this affidavit in behalf of petitioner herein named.

FRED'K BAUSMAN.

Sworn and subscribed to before me this 10th day of April, 1912.

[Seal] R. C. GOODALE,

Notary Public in and for the State of Washington, Residing at Seattle, Washington.

Copy of the within Petition received and due service of same acknowledged, this 10th day of April, 1912.

MUNN & BRACKETT,
Attorneys for Trustees.

[Endorsed]: Petition for Review of Order of Referee upon Objections to Claims of Metropolitan Trust Company Made and Entered April 1, 1912. Filed April 10, 1912, 11 A. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington, Apr. 15, 1912. A. W. Engle, Clerk. B. O. Wright, Deputy. [15]

[Certificate and Return of Referee in Bankruptcy.]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 4746.

In the Matter of WESTERN STEEL CORPORATION, a Corporation,

Bankrupt.

A petition for the review of the order made and filed herein on the 1st day of April, 1912, having been filed herein, the undersigned Referee in Bankruptcy before whom said matter is pending and who made said order, certifies and returns as follows, to wit:

That the matter involved in the order sought to be reviewed arose upon the petition filed by the trustees herein praying substantially for such an order as was so made and filed; that upon such hearing it was agreed in open court that the question of whether or not said petition should be granted and said order made should be submitted upon all of the files and records in the above-entitled proceeding, and upon such agreement it was so submitted. And the Referee being of the opinion that the attempted sale of the bonds referred to in said petition and order could not be sustained either as a private or public sale as provided for in the note to secure the payment of which said bonds were pledged, and it being further stipulated and agreed that the alleged owner of said bonds and of the indebtedness secured thereby had received payment thereon to an amount equal to such indebtedness. The referee was of the opinion that the reception of such sum had discharged the indebtedness so secured, and that the title to the bonds not having passed from the bankrupt by reason of the attempted foreclosure of the pledgee's lien, that all claims of the alleged owner of said indebtedness and said bonds had been satisfied, and that therefore the [16] evidence of such indebtedness and the bonds pledged to secure the same should be surrendered to the trustees for cancellation. The reason that the

Referee found that the attempted sale of the bonds could not be sustained as a private sale was that it was conceded in open court that the sale, though nominally to an outside party, was in fact a sale to the pledgee itself, and he was further of the opinion that it could not be sustained as a public sale, for the reason that the amount bid was not fairly commensurate with the value of the bonds, and for the further reason that the notice, under all the circumstances disclosed, was not a sufficient notice to entitle a sale by virtue thereof to stand as a public sale.

The Referee therefore returns herewith the said petition, which was the foundation of the order of April 1st, 1912, the said order and said petition for review, together with all the files and records herein, as constituting a sufficient certificate and return to enable a Judge of the above-named court to review said order.

Dated at Seattle, in said district, this 15th day of April, 1912.

JOHN P. HOYT,
Referee in Bankruptcy.

In view of the fact that while all of the records and files were in evidence upon the hearing hereinbefore referred to comparatively few of the very large number of papers on file have any bearing upon the question presented at such hearing, said Referee instead of actually transmitting all of said files as above stated respectfully refers thereto, and will transmit such portions thereof as counsel on either

side may desire to have considered by the Judge who reviews said order.

JOHN P. HOYT,
Referee in Bankruptcy. [17]

[Endorsed]: Certificate and Return. Filed in the United States District Court, Western District of Washington. Apr. 15, 1912. A. W. Engle, Clerk. B. O. Wright, Deputy. [18]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

Statement of Agreed Facts.

WHEREAS, the Referee in Bankruptcy has filed his certificate herein upon the petition for review, and as the order here sought to be reviewed was made upon all the records and files in this cause, and as the same are very voluminous, for the purpose of supplementing the certificate filed herein by the Referee, in order that the Court may more easily pass upon the questions presented upon this petition, the following facts are agreed on between the counsel for petitioner and the counsel for trustees in bankruptcy;

1. In January, 1911, Western Steel Corporation, a Washington corporation, borrowed $300,000.00

from Metropolitan Trust Company of the City of New York, and pledged $1,800,000.00 par of its total issue of $2,000,000.00 of mortgage bonds.

2. On the 1st day of April, 1911, it borrowed an additional $300,000.00, pledging the remainder of its bond issue, as well as the $1,800,000.00 par previously pledged, and executing a note for $600,000.00 in the Trust Company's favor, dated April 1, 1911, and due August 1, 1911. On this note, James A. Moore, then president and a very large stockholder of the Steel Corporation, became guarantor. By the terms of this note the Trust Company possessed, among other powers as pledgee, the right upon nonpayment of the note at maturity to sell the collateral bonds at public or private sale, with or without notice, and the right itself to become a purchaser. A copy of this note is set out as Exhibit "A" to this agreed statement. [19]

3. On its maturity, on the 1st of August, 1911, no part of the principal of this note was paid, and the Trust Company did send from New York the following letter, signed by its second vice-president:

"August 1, 1911.

"Mr. James A. Moore, President,
Western Steel Corporation,
Seattle.

Dear Sir:

I beg to call your attention to the fact that the note of your company for $600,000, of which you are the guarantor, which became due and payable to-day, was not paid. I am instructed to notify you that if the same shall not be paid on or before Monday, Au-

gust 28, 1911, the securities therefor will be sold at public auction in this City, on Wednesday, August 30, 1911, and that in case there shall be a deficiency, this company will look to you to make good any loss.

Yours very truly,
BEVERLY CHEW,
2d Vice-President."

4. In response to this communication the Trust Company did receive the following reply:

"WESTERN STEEL CORPORATION.

Cable Address:
Weststeel. Seattle, U. S. A.
August 11th, 1911.

Mr. Beverly Chew,
2d Vice-President,
Metropolitan Trust Co.,
49 Wall Street, New York.

Dear Sir:

Your favor of the 1st inst. to hand, advising me of the extension of time on the note of Western Steel to August 28th. I expect between now and that time to complete arrangements that will take up the note in full.

Thanking you for all your courtesy in this matter, I am, Yours very truly,
J. A. MOORE,
President.

JAM:A."

5. No part of this note was paid and the following proceedings were had by the Trust Company: It caused the aforesaid bonds to be advertised in the *New York Evening Post* on August 29, 1911, and in

the *New York Times* and *Wall Street Journal* on the morning of August 30, for sale by public auctioneers at half-past [20] twelve o'clock of that day in the city of New York, and caused notices of such sale to be mailed to the principal bond buyers, banking and financial corporations, firms and individuals in the financial district of New York City, and said sale was advertised and conducted as stated in the affidavit of Andrew J. McCormick, hereto annexed. The aforesaid Trust Company itself at the sale held as advertised at public auction became the purchaser of these bonds as the highest and best bidder therefor in the sum of $25,000.00. This amount it credited upon the note of $600,000.00, less the expenses of sale.

6. At the time of this sale, the bonds aforesaid had never been listed as standard securities, and concerning their value and concerning the properties which they covered, no definite information was possessed by the commercial world, and all that can be said of their actual worth is such as is disclosed in paragraphs 10, 11 and 12 of this agreed statement.

7. The newspapers in which sale was advertised are generally considered in the city of New York to be the best media for reaching bidders and buyers of stocks, bonds and financial securities generally, and one of them is the paper designated by Rule 27 of the United States District Court in Bankruptcy for the Southern District of New York as the paper for the publishing of notices of auction sales. The place where said sale was had is the place designated by Rule 62 of the General Rules of Practice of the Supreme Court of the State of New York for public

auction sales, and is a usual and proper place for such sales. Said bonds were sold at a regular auction sale held weekly at that time and place for the sale of stocks, bonds and financial securities, and largely attended by buyers of financial securities. The proceedings for the sale of these securities, the notice given, and the manner in which the sale [21] was advertised and conducted were those which are customary, regular, and usual in the sale of listed or known stocks, bonds and financial securities marketable in the city of New York. No steps were ever taken and no proceeding brought by Western Steel Corporation, James A. Moore, or any other person to attack or set aside the sale of said securities. The question of the validity of such sale was raised for the first time in the bankruptcy proceedings as hereinafter set forth.

8. October 26, 1911, the Steel Corporation was adjudicated a bankrupt in this Federal District Court, and thereupon the Trust Company did present its claim in bankruptcy as an unsecured creditor for the amount of the unpaid balance of the note for $600,000. It did not at that time present any claim for the bonds, but did at all times assert its ownership of the bonds as separate obligations of the bankrupt.

9. The bonds aforesaid were of a total issue of $2,000,000.00 face value, secured by general trust deed upon all the properties of the bankrupt, with Carnegie Trust Company and Lawrence A. Ramage as trustees for the bondholders. For these two trustees, Metropolitan Trust Company and James F.

McNamara, had become substitutes before and at the time of the loan of $600,000.00 aforesaid, and still were trustees for the bondholders at the time of the proceedings in bankruptcy. The trust deed purported to cover all the properties of the bankrupt, but in so far as personalty was concerned was defective, in that it did not have the chattel mortgage affidavit required by the laws of the State of Washington, and as to personal property, save the shares of stock actually delivered in pledge thereunder, was not binding. The bonds were all of the same tenor, and in the form shown in Exhibit "B," hereto annexed, the same being one of the original bonds endorsed [22] with part payment and marked "cancelled" by order of the Referee.

10. The properties of the bankrupt consisted of:

(a) Sundry undeveloped mines, and iron ore, limestone, and other minerals in British Columbia, Washington, and Nevada, descriptions of which were available, but the values of which were wholly uncertain. Of those properties the Nevada iron property appraised at $25,000.00 by the appraisers in bankruptcy was only partly paid for, the original owners claiming a vendor's lien thereon in the sum of approximately $100,000.00, proceedings for the foreclosure of which are now under way.

(b) A steel manufacturing plant and blast furnace in the State of Washington, which was then, and had ever since its construction, and for more than a year been operated intermittently and unsuccessfully but under unfavorable conditions of management. This was then an experimental industry on Puget

Sound, no other steel plant being or having been in operation west of the Rocky Mountains, and the suitability of the plant's location, the adequacy and suitability of its construction and equipment, and the possibility of its profitable operation were then in doubt and dispute both in the commercial world generally and in New York, as well as in Seattle and in the State of Washington.

(c) A tract of land on Graham Island in British Columbia, Canada. This last asset, however, was not held directly by Western Steel Corporation. The interest of the latter company in this tract was as follows: Western Steel Corporation owned seven-eighths of the stock of a Canadian corporation called Western Coal & Iron Corporation, Limited. This Canadian corporation in turn was not the owner of the lands, but had a contract right to acquire them by option under deposited escrows in Victoria, British Columbia. [23] At the time of the sale of the securities in New York and of the bankruptcy in Seattle, there was due and payable upon these lands under pain of forfeiture of the escrows, $250,000.00, and there had been paid in the past approximately $150,000.00. The escrows call for annual payments of $50,000.00, with six per cent per annum interest payable semi-annually upon the whole deferred principal, and provide for absolute forfeiture of all past payments and cancellation of the option in case of twenty days' default in payment of principal or interest. The shares of stock of the Western Steel Corporation in the Canadian Company, the Western Coal & Iron Corporation, Limited, were at the time

of the loan in New York and at the time of the sale of the bonds in New York, and at the time of the bankruptcy, directly deposited with the Trust Company and held by it in actual possession, and were as an asset correctly described in the trust deed as held for the security of the bondholders. The right of James A. Moore and Western Steel Corporation to the shares of stock in Western Coal & Iron Corporation, Limited, above described were, however, at the time of the sale of the bonds in New York City, and at the time of the bankruptcy proceedings, in litigation in the courts of British Columbia, and such litigation is still pending and undetermined.

11. At the time of the sale of the bonds in New York and also at the time of the bankruptcy in Seattle, the Graham Island tract was known to contain timber, and it was also supposed to contain a deposit of coal. The latter, however, had never been explored, and its value was hypothetic. The timber on the property, according to then available reports, was worth a good share of the purchase price remaining unpaid. At the time of the sale of the bonds in New York, and at the time of the commencement of the bankruptcy proceedings, there was due laborers employed on the plant at **[24]** Irondale approximately $25,000.00, which sum constitued a lien upon said plant prior to the mortgage securing the bonds held by Metropolitan Trust Company. The patents for certain of the Quatsino Sound properties referred to in the appraisers' report were and are held by the company's barristers in the Province of British Columbia under attorneys' liens for ser-

vices on which they claim indebtedness of approximately $2,500.00.

12. The appraisers in bankruptcy appraised the interest or equity of the bankrupt in the Graham Island property, as represented by the stock in Western Coal & Iron Corporation, Limited, held by the bankrupt and deposited with the Trust Company, as worth on a quick sale for cash the sum of $200,000, explaining, however, in their report, a copy of which is attached hereto marked Exhibit "B," and by reference made a part of this paragraph, that the said property if developed in connection with the operation of the steel plant as a going concern, would be greatly enhanced in value above the figures named. The appraisers also valued the steel plant, blast furnace works and plant site, together with all machinery and equipment used in connection therewith, at $99,035.00 on the basis of a quick sale for cash with the explanation that valued as a going concern properly financed, the same property, together with certain raw and finished material and supplies, would be worth $399,942, as is more particularly set out in the said report. The valuation placed upon all assets of the company, both under and outside the mortgage amounted to $458,141.00 estimated upon the basis of a quick sale for cash. The same properties, if the steel plant were operated as a going concern, adequately financed, the appraisers estimated would be worth an amount greatly in excess of the said total figure. All of which is in detail set out in the said appraisers' report. Appraisals of other properties are disclosed in said report, hereto annexed. **[25]**

13. In the bankruptcy aforesaid such proceedings were had that the Trust Company duly filed herein its proof of claim on said issue of $2,000,000.00 of bonds, together with the entire issue of bonds, and the mortgage securing the same, praying that these, after crediting the amount for which the same should be used in paying for the properties covered by the mortgage and purchased at the bankruptcy sale, be allowed as a general claim against this estate. Thereafter sundry creditors instituted a controversy with the Metropolitan Trust Company in consequence of which the Referee therein did cause an order to be entered that the sale of the bonds in New York, though conducted with no fraudulent intent, had been insufficient to pass title to the Metropolitan Trust Company as purchaser, and that the latter company still held the bonds only as collateral to the original debt, with interest, and in making the order for the sale of the assets of the bankrupt, he permitted the Trust Company, in case it should be a bidder thereat, to use the bonds only in their collateral quality, but by reserving to the Trust Company the right, after the sale, to raise again the question of the validity of its purchase by auction in New York and its right to use the bonds as obligations in excess of the amount bid at the sale.

14. In the Order of Sale of the assets of the bankrupt corporation provision was made by the Referee for both lump and partial bids, and it was provided that that bid should be accepted which would be most advantageous to the estate. The sale of the assets of Western Steel Corporation as conducted,

approved and confirmed by this Court was by means of sealed bids addressed to the trustees in bankruptcy in care of the Referee, and by him opened in presence of the Referee at the time of sale. Notice of the sale was reasonable and sufficient, and was given by publishing the same **[26]** with a description of the property to be sold, and the terms, time, place and manner of sale as follows:

In the "Seattle Post-Intelligencer," ten insertions;

In the "Seattle Daily Times," ten insertions;

In the daily newspaper published in Jefferson County, Washington, ten times, and in other newspapers published in British Columbia and Nevada, all of said newspapers being of general circulation. The property was offered in twenty-nine several parcels. At the sale there was no lump bidder except the said Metropolitan Trust Company and only for a relatively trifling portion of the property were there partial bids by others than said Metropolitan Trust Company, these bids being received on thirteen out of the total of twenty-nine parcels so offered. None of the parcel bids above referred to were equal in amount to the bid of Metropolitan Trust Company for the corresponding parcel, and the Metropolitan Trust Company having bid on all the parcels severally and also on the entire property as a whole, its bid for the whole property was found to exceed the total of its bid for the several parcels. Under this order, the properties were bid in by the Trust Company and the sale confirmed in the sum of $720,000.00, which sum the said Trust Company

was allowed to make payment of in its bonds to the extent of $647,010.00, and in cash to the extent of $72,990.00. Thereafter, upon petition of the trustee asking for cancellation of the original note of $600,000 and of the entire issue of bonds upon the ground that the Trust Company, as the alleged owner of said bonds and of the indebtedness, had received payment thereon in an amount equal to such indebtedness through the use of said bonds at the sale aforesaid, the Referee reaffirmed his decision that the sale of said bonds in New York had been ineffectual to pass legal title to the Trust Company, and that it was entitled to use them only to the extent of their collateral **[27]** quality, and thereupon an order was entered cancelling the bonds and said original note. On this ruling, a petition for review was filed by the Trust Company and the matter brought before this Court. The affidavits of Andrew J. McCormick and of Brayton Ives, copies of which are hereto annexed and marked respectively Exhibit "C" and Exhibit "D," were a part of the evidence received by the Referee in behalf of Metropolitan Trust Company, and are made a part of the record herein for the consideration of this Court.

Agreed to by counsel for the Trust Company and for the Trustees in Bankruptcy, this 26th day of October, 1912.

BAUSMAN & KELLEHER,
Counsel for Metropolitan Trust Co.
MUNN & BRACKETT,
Counsel for Trustees in Bankruptcy.

[Indorsed]: Statement of Agreed Facts. **[28]**

REPORT OF THE APPRAISERS OF THE WESTERN STEEL CORPORATION JANUARY 8, 1912.

Having been appointed by the Court on the 17th day of December, 1911, and 5th of January, 1912, we forthwith proceeded to appraise as far as possible the working plant, the real estate, and the various mining properties of the Western Steel Corporation, a bankrupt,

We respectfully report to the Court as follows:

The time allowed for such appraisal has been absolutely too short to allow a personal inspection of any of the mining properties of the bankrupt. Their valuations have been established through opinion formed after exhaustive perusal of the mining reports of W. Price, M. E., and others, as well as after conversations with mining experts well conversant with the said properties, and with brokers making a specialty of selling mines, or timber, mainly in Vancouver, B. C.

We personally inspected Irondale, and we have taken an inventory of the plant, which has been kept in a good condition.

Our appraisal is based on the value of the assets if they are forced under the hammer; that is, on a cash basis. **[29]**

APPRAISAL.

I.	IRONDALE PLANT. (Blast Furnaces, Open Hearth Furnaces, Rolling Mill.) AND QUICK SALE VALUE.	
	Power Plant and equipment, also Buildings and 20 acre site.....	$ 91,035.00
	Raw and finished material and supplies.....	15,504.50
		$106,539.50
	(As a going concern this same property would be worth $391,-942.)	
II.	Chinese Pig Iron. Equity.....	11,396.00
III.	30 acres of filled tideland, and dock.....	15,000.00
	750 shares of stock in the Western Horse Shoe Manufacturing Co.	No Value.
IV.	IRONDALE TOWNSITE AND OTHER REAL ESTATE.	

Due to the amendment to the sale of real estate to the bankrupt by Moore in Nov. 1910, which recites that the contracts receivable from previous sales are excepted, your appraisers have been unable to distinguish accurately what real estate belongs to-day to the bankrupt or to Moore Inv. Co. Many sales contracts have been forfeited, many lots resold. It

will require the utmost scrutiny to appraise the value of whatever is left or belongs to the bankrupt of the original 1500 townsite lots, and 970 acres of land in and about Irondale, as carried on the books of the bankrupt. Under such conditions, your appraisers are unable to state the value of this real estate.

There is, however, some scattered pieces of land approximating 70 acres which unquestionably belongs to the bankrupt and on this property we place a valuation of..... 1,730.00

$134,665.50

[30]

Brought forward..$134,665.50

V. SNOHOMISH COUNTY IRON PROPERTIES.

(Mr. Jefferson, the vender, holds notes, we are told for $2,000.00, unpaid, and the mining report on this property states that the best ore has been all taken away.

Under these conditions, we do not feel justified in placing any valuation whatever on this property.)

VI. SKAGIT COUNTY LIME PROPERTIES.

Owing to limited time and lack of satisfactory information your appraisers have been unable to appraise this property with any satisfaction as to accuracy, but we believe there is little of any value.

VII. QUATSINO SOUND IRON PROPERTIES.

30 full mineral claims, all of which are Crown Granted. If such is the case, and if there is blocked out on this property about 1,500,000 tons of ore and a probability of 5,000,000 tons more, which would cost $.70 per ton at the tide water, as per report of W. Price, M. E., then, we appraise this property at..... 25,000.00

VIII. ASFORD COAL PROPERTIES.

The leases which cover these two properties (Northwestern Impr. Co., 20 years from April 16, 1907; royalty $0.25 per ton.) (The Mashell Coal & Coke Co., 99 years from Jan. 29, 1908, royalties $0.10, $0.12, $.015 per ton) are forfeited we are told. No royalties have [31] been paid to

Brought forward..$159,665.50

the owners since October, 1910. Owing to the excessive charges of these contracts (minimum tonnage to be mined and heavy royalties) and owing to the underdeveloped state of the mines, your appraisers do not consider these leases to be of any value.

IX. (JACK ISLAND.) 10 acres.

We appraise this property at.. 250.00

X. NEVADA MINING PROPERTY (HEMATITE).

$1,000 only has been paid on account. The consideration for that property was $60,000 cash, $65,000 in bonds, $75,000 in stock; of which $1,000 in cash, $59,000 in Company's notes and $75,000 in stock have been paid. This property has been deeded to the corporation. If there is a probability of 39,000,000 tons of ore, as per report of L. N. Dickman, in the absence of any other information other than the mining reports, your appraisers will put an appraisal of..... 25,000.00

XI. STEVENS COUNTY DOLOMITE.

The bankrupt holds a warranty deed to this property (6 acres) near Cheuelah. W. Price reports

7,000,000 tons of dolomite a conservative estimate. We appraise this property at..... 2,500.00

XII. LOUISE ISLAND. Iron.

Purchased from J. B. Sword and H. K. Owens. We understand that the sale contract is forfeited. (Amount unpaid $22,500.00.)

XIII. GRAHAM ISLAND PROPERTIES.

We regard this property as the most valuable **[32]** single asset

Brought forward..$187,415.50

of the bankrupt, 20272½ acres, Crown Granted. A great deal of expensive development work is required before it would be possible to realize on these coal properties.

J. A. Burke, of Tacoma, cruiser, reports 553,617,000 feet of timber on the property (yellow cedar, spruce, hemlock, etc.).

We appraise the equity in this property at..... ..... 200,000.00

XIV. Office furniture..... ..... 1,000.00

XV. Accounts receivable—Equity.... 22,350.00

$410,765.50

In conclusion, we think it is only fair to say and we respect-

fully submit that in the event of sufficient capital being provided to continue the operation of the plant, certain of the above mining properties, which are important if not indispensable, to the success of the steel industry on the Pacific Coast, would be greatly enhanced in value beyond the figures herein named.

R. AUZIAS TURENNE.
HUGH M. STREET.
T. E. HAYWOOD.

[Indorsed]: Appraisers' Report. Filed Jan. 10, 1912, 2. P. M. John P. Hoyt, Referee. **[33]**

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 4647.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

Report of Appraisers.

Jan. 10, 1912.

We, the undersigned, having been heretofore duly appointed to appraise the real and personal property belonging to this estate, report as follows:

We have each of us personally and in great detail inspected and appraised the plant and property, real and personal, at Irondale, and we have taken an in-

ventory of that plant, which we find has been kept in good order.

In appraising this estate, we have been obliged to take into consideration the wide divergence between the value which the property would have if it were a going concern in successful operation and adequately financed and that which it is worth and will bring if placed upon the market under existing conditions.

Our appraisal is based upon the value of the assets for immediate sale for cash, but we have also stated for the information of creditors the valuation which we believe the Irondale plant would have as a going concern, if adequately financed and operated in connection with some of the other properties.

Owing to the advisability and necessity of a reasonable prompt appraisal of this property, and owing to the inaccessibility of some of the mineral properties during the winter months, it has been impossible for us to make **[34]** a personal inspection of the outlying mining properties belonging to this estate. Our estimates have been based upon opinion formed after consultation with experts conversant with these properties and with brokers making a specialty of dealing in similar properties, and after careful perusal of the reports of W. Price, M. E., and other mining engineers. We have made these inquiries with great care, both in this city and in Vancouver, B. C., devoting several days' time to such investigation of these outlying assets.

With reference to bankrupt's interest in Irondale real estate, bills and accounts receivable, pledged

materials, unadjusted claims, etc., we have been obliged to consult the bankrupt's report, putting our own valuations upon the various equities referred to in that report as assets.

APPRAISAL.

I.	IRONDALE PLANT.	
	All buildings with blast furnace, open hearth furnaces, rolling mills, power plant, etc., including all machinery and equipment..... ....$	89,035.00
	20 acre tract appropriated for plant site including dock....	10,000.00
	Raw and finished material and supplies	15,504.50
		$114,539.50
	(Our valuation of this same property, as it stands, to any going concern adequately financed and properly managed, is placed at $399,942.00.)	
II.	Approximately 20 acres filled tide land adjoining plant site on the North.....	5,000.00

[35]

III.	IRONDALE TOWNSITE & REAL ESTATE—NOT OTHERWISE SPECIFIED.	
	Due to the amendment to the contract of sale of real estate to the bankrupt by Moore in	

November, 1910, which recites that the contracts of sale previous to that date are excepted, and owing to the confusion of the bankrupt's records, your appraisers have been unable to fix with any accuracy the present real estate holdings of the bankrupt at Irondale. Assuming, however, that all lots covered by forfeited sales contracts have already reverted to the bankrupt's estate, and that all sales contracts on which payments are to be made will, in the event of liquidation, be forfeited and the lots, likewise, revert to bankrupt's estate, then these real holdings amount to approximately 50 acres, which we appraise at $2,500.00

(With the reorganization of the company, the continued operation of the plant, and confidence restored, the equity in this same property would have a valuation of $38,000.00. This figure is subject, however, to some increase or deduction, according as Moore's modification of his agreement for the

transfer of this property is held valid or invalid. A more accurate appraisal of this property is not possible at this time.)

[36]

There are also some scattered pieces of land approximating 70 acres altogether which unquestionably belong to the bankrupt, and on this property we place a valuation of.....$ 3,500.00

IV. 997 Shares of the Capital Stock of the Western Horseshoe Mfg. Co. As the property of this company is encumbered with a mortgage of $25,000, we appraise the bankrupt's interest in same as of..... No Value

5 shares of the Capital Stock of the Northwestern General Hospital..... .... No Value

V. Equity in Accounts and Bills Receivable including Assigned Accounts and unadjusted claims..... .... 45,000.00

VI. Cash on hand..... 101.53

VII. Equity in Pledged Materials and Manufactured products.. 25,500.00

VIII. Machinery, Tools and Equipment at outlying properties,

mainly at Ashford, Pierce Co., Washington..... .... .. 5,000.00

IX. Office Furniture, Seattle..... 1,000.00

SNOHOMISH COUNTY IRON ORE PROPERTY.

X. Consisting of 155 acres. Inasmuch as a mining report states that all good ore has been taken from this property, we put a valuation upon it as acreage at..... ..... 1,000.00

[37]

XI. SKAGIT COUNTY LIME PROPERTY.

We have been reliably informed that there is no lime rock of any value on this property. We, therefore, appraise this property, approximately 40 acres, at.....$ 1,500.00

XII. QUATSINO SOUND IRON ORE PROPERTY.

It is reported to us that this property consists of 30 full mineral claims, all of which are Crown granted. Basing our valuation upon the report of W. Price, M. E. which states that there is blocked out on this property about 1,500,000 tons of ore and a probability of 5,000,000 tons more, costing

not to exceed 70c per ton mined and delivered at tide water, and recognizing only the speculative value of the property under forced sale, we appraise it at..... ..... 25,000.00

XIII. ASHFORD COAL PROPERTIES.

Leases cover these two properties. (Northwestern Improvement Co. 20 years from April 16, 1907; Royalty 25c per ton; and the Mashell Coal & Coke Co. 99 years from January 29, 1908; Royalties 10, 12, and 15c per ton.) No royalties have been paid to the owners since Oct. 1910. By reason of the excessive and unwarranted charges of these contracts with respect to the minimum tonnage to be mined and heavy royalties, and considering the undeveloped state of the mines, your appraisers consider *these lease* as of.... No Value

[38]

XIV. JACK ISLAND *SLI*CA PROPERTY.

We appraise this property at...$ 1,000.00

XV. NEVADA IRON ORE PROPERTY.

In the absence of any information concerning this property, other than one mining report, we are compelled to base our valuation upon a consideration of the agreed purchase price, and in connection therewith the probability of a cash sale within a reasonably short time, having in mind the elimination of the Bankrupt as a customer and recognizing only the purely speculative value of the property, under conditions of forced sale, we appraise this property at..... .... 25,000.00

XVI. STEVENS COUNTY DOLOMITE PROPERTY.

The bankrupt holds a Warranty Deed for this property (6 acres) near Chewelah, Wash., W. Price, M. E., reports 7,000,000 tons of Dolomite as a conservative estimate of the production to be obtained from this property. We appraise it at..... 2,500.00

XVII. LOUISA ISLAND IRON ORE PROPERTY.

Purchased from J. B. Sword and H. K. Owens. We understand the sales contract is forfeited. No Value

XVIII. GRAHAM ISLAND COAL & TIMBER PROPERTY.

We regard this property as the most valuable single asset of the Bankrupt. 20,272½ acres. Crown granted. A great deal of expensive development work [39] is required, however, before it will be possible to determine the real commercial value of the coal property.

Basing our valuation upon the timber cruise of Mr. J. W. Burke of Tacoma, Wash., who reports 553,000,000 ft. of spruce, yellow and red cedar, hemlock, etc., and recognizing the speculative value of indications of vast deposits of high grade coal, we appraise the equity in this property at 200,000.00

Total Quick Cash Sale Value...$458,141.03

In conclusion, we think it is only fair to say, and we respectfully submit for the information of creditors that, in the event of sufficient capital being provided, to continue the operation of the plant, certain of the above mining properties which are important, if not indispensable, to the success of the steel industry on the Pacific Coast, would be greatly enhanced in value beyond the figures herein named.

Furthermore, it is our opinion that if sufficient time were allowed for promotion and negotiation, whether or not the plant at Irondale is operated, much higher prices for some of these outlying properties could be obtained.

R. AUZIAS TURENNE.
HUGH M. STREET.
T. E. HAYWOOD.

[Indorsed]: Supplemental Report of Appraisers Jan. 10, 1912. Filed Jan. 17, 1912, 2 P. M. John P. Hoyt, Referee. **[40]**

[Affidavit of Brayton Ives.]

EXHIBIT "C."

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. ——.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

State of New York,
County of New York,
Southern District of New York,—ss.

At the city of New York, Southern District of New York, on the 4th day of November, 1911, came Brayton Ives of the city, county and State of New York, and made oath and says: That I am the President of the Metropolitan Trust Company of the city of New York, a corporation incorporated by and under the laws of the State of New York, and

carrying on business at No. 49 Wall Street, in the city, county and State of New York. The Western Steel Corporation, the bankrupt above named, is justly and truly indebted to the said Metropolitan Trust Company in the sum of Five Hundred and Seventy-eight Thousand Five Hundred and Four Dollars ($578,504), with interest thereon at the rate of six per cent per annum from August 31, 1911, to October 11, 1911, amounting to Three Thousand Nine Hundred and Fifty-three and 11/100 Dollars ($3,953.11), making in all the sum of Five Hundred and Eighty-two Thousand Four Hundred and Fifty-seven and 11/100 Dollars ($582,457.11). The said debt exists upon and is the amount due and owing upon a certain promissory note made by the said Western Steel Corporation to the said Metropolitan Trust Company on or about **[41]** the 1st day of April, 1911. The said note was dated and delivered to the said Metropolitan Trust Company by the said Western Steel Corporation on the 1st day of April, 1911, and by it the said Western Steel Corporation promised to pay to the order of the said Metropolitan Trust Company on the 1st day of August, 1911, the sum of Six Hundred Thousand Dollars ($600,000), with interest thereon at the rate of six (6) per cent per annum. A copy of said note, marked Exhibit "A," is hereto annexed and made a part of this affidavit. As stated in the said note, the said Western Steel Corporation deposited with the said Metropolitan Trust Company as collateral security for the payment thereof Two Million Dollars ($2,000,000) Western Steel Corporation first mort-

gage six per cent. bonds. By the terms of the said note the said Metropolitan Trust Company was authorized upon the nonpayment of the same, when due, to sell, assign and deliver the whole of the said securities, or any part thereof, at any broker's board, or at public or private sale, at the option of the said Metropolitan Trust Company, without either advertisement or notice, which were thereby expressly waived, and if such securities or property were sold at public sale, the said Metropolitan Trust Company might itself purchase the whole or any part thereof free from any right of redemption on the part of the Western Steel Corporation, which was thereby waived and released, and in case of sale from any cause, after deducting all costs or expenses of every kind for collection, sale or delivery, the said Metropolitan Trust Company was authorized to apply the residue of the proceeds of the sale so made to pay the liability to the said Metropolitan Trust Company, and the said Western Steel Corporation agreed to be and remain liable to the said Metropolitan Trust Company for any deficiency arising [42] upon such sale. The said note was not paid at maturity, nor was any part of it. Thereupon the said Metropolitan Trust Company immediately notified the said Western Steel Corporation and James A. Moore, its President, the guarantor of the said note, that if it was not paid on or before Monday, August 28, 1911, the securities therefor would be sold at public auction in the city of New York on Wednesday, August 30, 1911, and that in case there should be a deficiency the Metropolitan Trust Company

would look to him to make good any loss. Hereto annexed, and marked Exhibit "B," and made a part hereof, is a copy of the letter by which they were so notified. The said letter was received by the said Western Steel Corporation and by the said James A. Moore, as appears by letter of the said Moore, as President of the said Western Steel Corporation, on letterhead of the said corporation, written from Seattle on August 11, 1911, which is hereto annexed, marked Exhibit "C," and made a part hereof. The said note was not paid on or before August 28, 1911, nor was any part of it. Accordingly, the said Metropolitan Trust Company directed that the said bonds be sold at public auction on the 30th day of August, 1911, and the same were so sold. The said sale was conducted by Adrian H. Muller & Son, auctioneers, at their regular auction sale of stocks and bonds held at the Exchange Sales Rooms, Nos. 14 and 16 Vesey Street, in the County and City of New York, on said 30th day of August, 1911. I have been actively engaged in the banking business in the City of New York for over forty years and am familiar with the customs in regard to the sales of securities at public auction. For many years a great majority of the public auction sales of stocks and bonds, such as the said bonds of the **[43]** Western Steel Corporation, which are not dealt in on the New York Stock Exchange, nor sold on the curb, have been conducted by said Adrian H. Muller & Son as auctioneers. Their sales take place Wednesdays at 12:30 o'clock. They send to financial institutions a list of the securities to be sold

and advertise the same in the newspapers, such as the "New York Times," which is the paper designated by rule 27 of the Rules of the District Court in Bankruptcy for the Southern District of New York as the paper for the publication and notice of auction sales, the Wall Street Journal and the "New York Evening Post," which are recognized as the best media for financial notices. Upon the list so sent around to financial institutions and so advertised in the said "New York Times," "Wall Street Journal" and "New York Evening Post" for the said sale on Wednesday, August 30, were the Two Million Dollars ($2,000,000) Western Steel Corporation bonds hereinbefore referred to. The Exchange Sales Rooms, the place where the said sale was had, is the place designated by rule 62 of the General Rules of practice of the Supreme Court of the State of New York, adopted pursuant to section 94 of the Judiciary Law of the State of New York, the same being chapter 35 of the Laws of 1909 and the said section being a re-enactment of a similar provision theretofore contained in Article II of the first title of Chapter 1 of the Code of Civil Procedure of the State of New York for the sale of real estate at public auction, said rule providing, among other things, that "where lands in the County of New York * * * are sold under a decree, order or judgment of any Court, they shall be sold at public auction * * *. Such sales in the County of New York, unless otherwise specifically directed, shall take place at the Exchange Sales [44] Rooms now located at 14-16 Vesey Street, in the City of

New York." The sale that was had of the said bonds was had in the same way in which public auction sales of such bonds are customarily and regularly had.

The net proceeds of the sale for $25,000 of the said collateral securities were the sum of Twenty-four Thousand Four Hundred and Ninety-six Dollars ($25,496), which sum the said Metropolitan Trust Company has applied upon account of the amount due upon the said note as follows: Three thousand Dollars ($3,000) to the payment of interest due on August 31, 1911, and Twenty-one Thousand Four Hundred and Ninety-six Dollars ($21,496), upon the principal of said note, leaving now due and owing to the said Metropolitan Trust Company from the bankrupt herein the sum of Five Hundred and Seventy-eight Thousand Five Hundred and Four Dollars ($578,504), with interest, as hereinbefore stated. The said Metropolitan Trust Company is and has always been the owner and holder of said note. The consideration of said note was money loaned to the said bankrupt by the said Metropolitan Trust Company on or about the 1st day of April, 1911.

No judgment has been rendered upon said indebtedness. No part thereof has been paid, except as hereinbefore stated. There are no setoffs or counterclaims to the same. The said Metropolitan Trust Company has not, nor has any person by its order, or to the knowledge or belief of deponent, for its use had or received any manner of security for said debt whatever, except as hereinbefore stated, and it now holds, and since prior to the making and filing of the

petition for adjudication of bankruptcy herein has held no [45] security therefor.

BRAYTON IVES.

Sworn and subscribed to before me this 4th day of November, 1911.

[Seal] A. E. VOGLER,
Notary Public Kings County, N. Y.

Certificate filed in New York County. [46]

[Note, for $600,000, Dated April 1, 1911, Western Steel Corporation to Metropolitan Trust Co.]

EXHIBIT "A."

$600,000#. New York, April 1st, 1911.

On August 1, 1911, for value received, the undersigned promise to pay to the order of The Metropolitan Trust Company of the City of New York, at its office in New York City, in funds, current at the New York Clearing House, with interest from the date hereof at the rate of 6 per cent per annum, Six hundred thousand # dollars; having deposited with the said company as collateral security for the payment of this and any other liability or liabilities of the undersigned or of the guarantors hereof to the said company, due or to become due, or which may hereafter be contracted or existing, the following property, viz.: $2,000,000 Western Steel Corpu. 1st Mtg. Coll. 6% Bonds, of an estimated market value of $———, and the undersigned also hereby giving to the said Company a lien for the amount of all the said liabilities upon all the property or securities at any time given unto or left in the possession or custody of the said company by or for the undersigned,

for safe keeping or otherwise, or in which the undersigned has (or have) any interest, and also upon the balance of the deposit account of the undersigned with the said company existing from time to time.

In case the securities at any time pledged for any of the above named liabilities should decline in market value or for any reason become unsatisfactory to the said company, the undersigned agree to deposit with the said company additional securities to the satisfaction of the said company; and in case of failure to do so forthwith, this note shall become at once due and payable without demand of payment thereof, and the said company may immediately sell and apply the said securities in the manner and with the effect as hereinafter provided.

The undersigned do hereby authorize and empower the said [47] company, at its option, at any time, to appropriate and apply to the payment and extinguishment of any of the above named obligations or liabilities, whether now existing or hereafter contracted, any and all moneys now or hereafter in the hands of the said company, on deposit or otherwise, to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due; and further agree that in the event of the insolvency of the undersigned all the said obligations and liabilities shall, at the option of the said Company, become and be immediately due and payable without demand of payment.

The said company is hereby authorized, upon the nonpayment of any of the liabilities above mentioned when due, to sell, assign and deliver the whole of the

said securities, or any part thereof, or any substitutes therefor, or any additions thereto, or any other securities or property given unto or left in the possession or custody of the said Company by or for the undersigned, at any Broker's Board or at public or private sale, at the option of the said company, without either advertisement or notice, which are hereby expressly waived.

If such securities or property are sold at public sale, the said company may itself purchase the whole or any part thereof, free from any right of redemption on the part of the undersigned which is hereby waived and released.

In case of sale for any cause, after deducting all costs or expenses of every kind for collection, sale or delivery, the said company may apply the residue of the proceeds of the sale or sales so made, to pay either one or more or all of the said liabilities to the said company, whether then due or not, as it shall deem proper, making proper rebate for interest on liabilities not then due, and returning the overplus, if any, to the undersigned who agree to be and remain [48] liable to the said company for any deficiency arising upon such sale or sales.

[Seal] (Signed) WESTERN STEEL CORPORATION,
By JAMES A. MOORE,
President.

(On Back of Exhibit "A.")

In consideration of the making, at the request of the undersigned, of the loan evidenced by the within note, upon the terms thereof, and of the sum of one

dollar, the undersigned hereby guarantee to The Metropolitan Trust Company of the City of New York, its successors, endorsees or assigns, the prompt payment of the said loan when due, and hereby consent that the securities for the said loan may be exchanged or surrendered from time to time, or the time of payment of the said loan or any of the securities therefor extended, without notice to or further assent from the undersigned, and that the undersigned will remain bound upon this guarantee notwithstanding such changes, surrender or extension. The undersigned waive demand of payment from the maker of said note, and also waive notice of nonpayment of the said loan or note, and also waive notice of any sale of the collateral securities held for the said note. [49]

[Letter, Dated August 1, 1911—Second Vice-president to James A. Moore.]

EXHIBIT "B."

COPY.

August 1, 1911.

Mr. James A. Moore, President,
Western Steel Corporation,
Seattle.

Dear Sir:

I beg to call your attention to the fact that the note of your company for $600,000, of which you are the guarantor, which became due and payable to-day was not paid. I am instructed to notify you that if the same shall not be paid on or before Monday, August 28, 1911, the securities therefor will be sold at public auction in this city, on Wednesday, August 30, 1911,

and that in case there shall be a deficiency, this company will look to you to make good any loss.

Yours very truly,

2d Vice-president. [50]

"C."

WESTERN STEEL CORPORATION.

Cable Address:
Weststeel.

Seattle, U. S. A., August 11, 1911.

Mr. Beverly Chew,
2d Vice-President,
Metropolitan Trust Co.,
49 Wall Street, New York.

Dear Sir:

Your favor of 1st inst. to hand, advising me of the extension of time on the note of Western Steel to August 28th. I expect between now and that time to complete arrangements that will take up the note in full.

Thanking you for all your courtesy in this matter, I am, Yours very truly,

JAM:A J. A. MOORE,
President.

[Indorsed]: Affidavit of Brayton Ives. Filed January 26, 1912. 2 P. M. John P. Hoyt, Referee. [51]

[Affidavit of Andrew J. McCormack.]

EXHIBIT "D."

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. ——.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

State of New York,
County of New York,
Southern District of New York,—ss.

At the city of New York, Southern District of New York, on the 4th day of November, 1911, came Andrew J. McCormack, of the city, county and State of New York, and made oath and says: I am a member of the firm of Adrian H. Muller & Son, doing business as auctioneers in the city of New York, and having an office at No. 55 William Street, corner of Pine Street, in said city. Prior to the 30th day of August, 1911, the Metropolitan Trust Company of the city of New York, notified my said firm to sell at public auction on Wednesday, the 30th day of August, 1911, Two Million Dollars ($2,000,000) Western Steel Corporation first mortgage and collateral six per cent gold bonds due October 1, 1930. On the 30th day of August, 1911, I, as auctioneer for my said firm, conducted the sale of the said bonds, and they were then sold at public auction in the Exchange Sales Rooms, 16 to 18 Vesey Street, in the

City of New York, to J. W. Davis & Company at one and a quarter (1¼) per cent, that is, for Twenty-five Thousand Dollars ($25,000), the same being the best and highest bid made for them, and said J. W. Davis & Company being the highest bidder. **[52]**

For over sixty years my said firm of Adrian H. Muller & Son have been engaged in business as auctioneers in the sale of stocks and bonds at public auction. In recent years we have conducted the great majority of the public auction sales of stocks and bonds in the city of New York. Every Wednesday, at 12:30 o'clock, we conduct such a public auction sale of stocks and bonds at the aforesaid Exchange Sales Rooms. Our custom is, preliminary to the sale, to send to practically all the important banking and financial corporations, firms and individuals in the financial district of New York City a list of the securities to be sold, and to advertise that list in the "New York Evening Post" of the day before the sale and in the "New York Times" and the "Wall Street Journal" of the day of the sale. These papers are selected because they are considered to be the best media for reaching those who would be likely to bid. The "New York Evening Post" is well known to circulate among people of means and carries a large amount of the highest class of financial advertising. The "New York Times" is the paper designated by rule 27 of the United States District Court in Bankruptcy for the Southern District of New York as the paper for the publication and notice of auction sales. The "Wall Street Journal" circulates very largely in the financial district. Upon

the list for the sale on August 30, 1911, so sent to banking and financial corporations, firms and individuals and so advertised in the "New York Evening Post" on Tuesday, August 29th, and in the "New York Times" and "Wall Street Journal" on Wednesday, August 30th, were the bonds hereinbefore referred to. They formed one of twenty-four lots of different securities advertised for sale and sold on the said 30th day of August, 1911. The Exchange Sales Rooms, the [53] place where the said sale was had, is the place designated by rule 62 of the *B*eneral Rules of Practice of the Supreme Court of the State of New York, adopted pursuant to section 94 of the Judiciary Law of the State of New York, the same being chapter 35 of the Laws of 1909, and the said section being a re-enactment of a similar provision theretofore contained in Article II of the first title of chapter 1 of the Code of Civil Procedure of the State of New York, for the sale of real estate at public auction, said rule providing, among other things, that "where lands in the County of New York * * * are sold under an order, judgment or decree, of any Court, they shall be sold at public auction. * * * Such sales in the County of New York unless otherwise specifically directed, shall take place at the Exchange Sales Rooms now located at 14–16 Vesey Street, in the City of New York. The Appellate Division of the Supreme Court in the First Department is authorized to change the place at which such sales shall be made, may make rules and regulations in relation thereto and may designate the auctioneers or persons who

shall make the same." The said Appellate Division of the Supreme Court in the First Department, which is constituted of the County of New York, in the city of New York, has not changed the place, but the public auction sales of real estate continue to be made there. A certain number of auctioneers are entitled to conduct such sales there, and for many years our firm has been and now is one of the twenty auctioneers authorized to do so, and is the only one of them that does any considerable business in the public auction sales of stocks and bonds. The methods pursued in connection with the aforesaid advertisement and sale of the bonds hereinbefore referred to were those which are customary. They were in all [54] respects regular and the same as those pursued by us in connection with thousands of other lots of securities.

ANDREW J. McCORMACK.

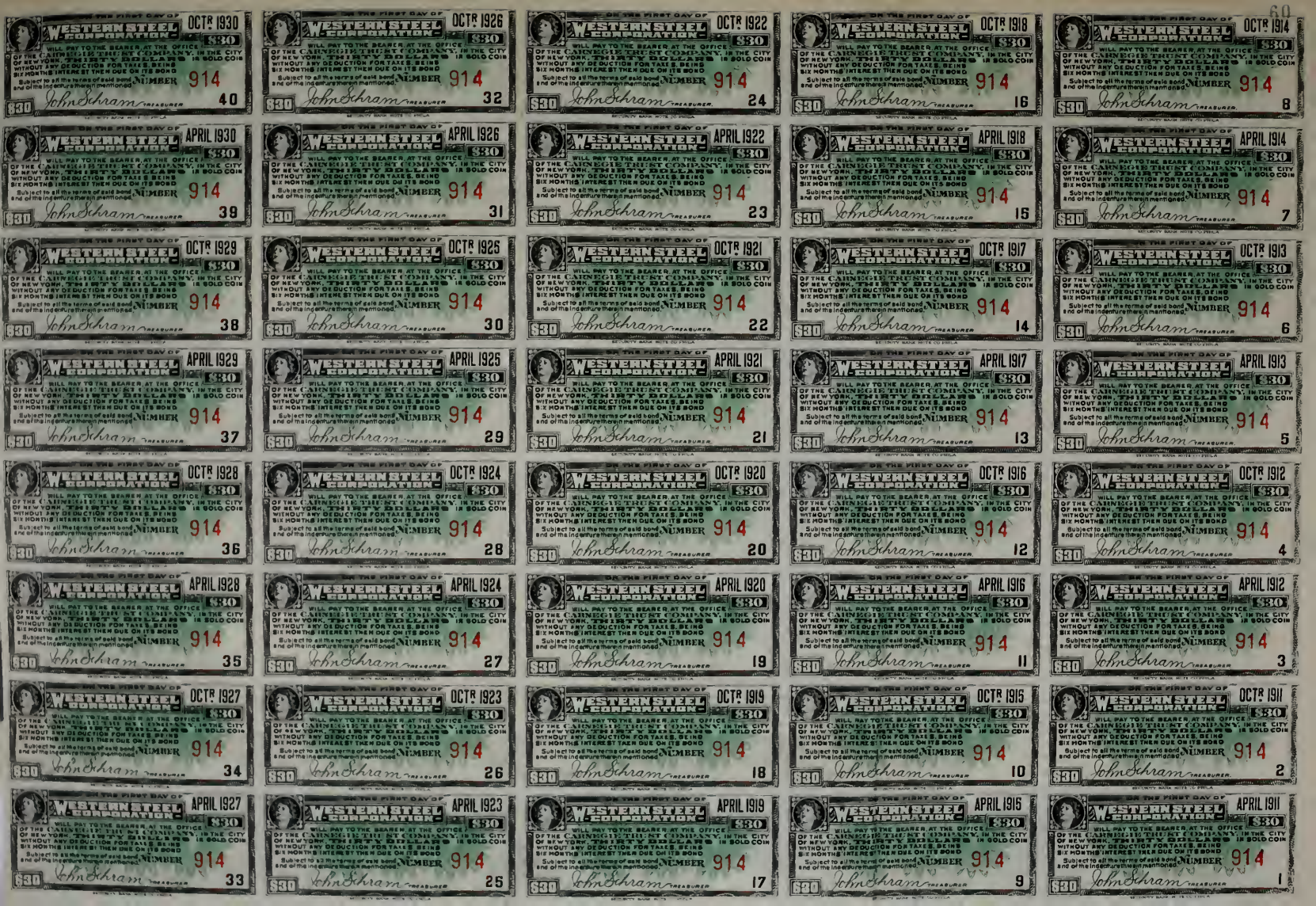
Sworn and subscribed to before me this 4th day of November, 1911.

[Seal] T. H. MACROBERT.

Notary Public, New York County, No. 260, New York Register, No. 3299.

[Indorsed]: Affidavit of Andrew J. McCormack. Filed Dec. 11, 1911, 2 P. M. John P. Hoyt, Referee. [55]

[Bond of Western Steel Corporation.]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No. 914

WESTERN STEEL CORPORATION

$1000.

FIRST MORTGAGE AND COLLATERAL SIX PER CENT GOLD BOND

INTEREST PAYABLE

April 1st and October 1st

PRINCIPAL DUE

OCTOBER 1ST A.D. 1930

TRUSTEE'S CERTIFICATE

It is Hereby Certified that this bond is one of the series of bonds mentioned and described in the Indenture within referred to.

Farmers Trust Company, Trustee.

per

VICE PRESIDENT

TREASURER

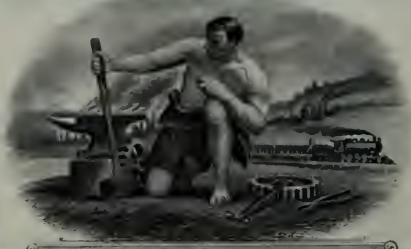
NOTICE

No writing on this Bond except by an Officer of the Company.

DATE OF REGISTRY	IN WHOSE NAME REGISTERED	TRANSFER AGENT

UNITED STATES OF AMERICA

STATE OF WASHINGTON



No. 914 No. 914

WESTERN STEEL CORPORATION

FIRST MORTGAGE AND COLLATERAL SIX PER CENT. GOLD BOND

The Western Steel Corporation, a corporation organized under the laws of the State of Washington (hereinafter called the Company), for value received hereby promises to pay to the bearer, or, if this bond be registered, to the registered holder hereof at the office of the Carnegie Trust Company, in the City of New York, on the first day of October A.D. 1930 the sum of One Thousand Dollars in gold coin of the United States of America, of or equal to the present standard of weight and fineness, and to pay interest thereon in like gold coin at the rate of six per centum per annum from the date hereof in semi-annual installments on the first days of April and October in each year upon presentation and surrender of the annexed interest coupons as they severally mature. Both principal and interest of this bond shall be paid without deduction for any tax or assessment charged in the nature thereof between or on the debt or interest evidenced hereby, which the Company, its successors or assigns or any one acting on its or their behalf, may be required to pay or to retain therefrom by any present or future law of the United States or of any State, County or municipality therein.

This bond is one of a series of twenty five hundred (2500) bonds all of like tenor, of which the bonds numbered from 1 to 500 both inclusive are of the denomination of One Thousand Dollars ($1000) each and those numbered from 501 to 2500 both inclusive are of the denomination of Five Hundred Dollars ($500.00) each, all of said bonds being of the aggregate par value of Two Million Dollars ($2,000,000) and being equally secured by a first mortgage or deed of trust, bearing date the first day of October A.D. 1910, made and executed by said Western Steel Corporation to the Carnegie Trust Company and Lawrence C. Damages, Trustees, and upon certain property owned by said Western Steel Corporation. For a description of the property mortgaged, the nature and extent of the security, the rights of the holders of the bond, and the terms and conditions upon which the bonds are issued, reference is hereby made to said mortgage or deed of trust.

This bond is subject to redemption and prepayment before maturity on any semi-annual interest date, from and after the first day of October A.D. 1912 at one hundred and five per centum of the par value hereof, and accrued interest, in the manner and upon the terms set forth in said mortgage or deed of trust.

This bond shall pass by delivery, unless registered in the name of the owner on the books of the Company at the Carnegie Trust Company, such registration to be evidenced hereby by the notation of the Registrar on this bond. After such registration duly endorsed hereon no transfer hereof shall be valid unless made on said books and similarly noted hereon, but the same may be discharged from registry by being transferred in like manner to bearer, which thereupon transferability by delivery shall be restored. Such registration, however, shall not affect the transferability of the coupons for the interest herein by delivery and payment to the bearer thereof, shall discharge the Company in respect to the interest thereon mentioned, whether or not this bond shall have been registered.

The holder of this bond by accepting it agrees that no recourse shall be had for the payment of the principal or interest of this bond against any incorporator, stockholder, director or officer of the Company, past, present or future, directly or through the Company, by any and all liability of incorporators, stockholders, directors and officers of the Company is hereby waived and released.

In default in the payment of interest or of the principal of any of said bonds, the principal of said bonds may be declared due and payable before the above specified maturity, together with the accrued interest thereon, as provided in said mortgage or deed of trust.

This bond will not become obligated until the Carnegie Trust Company's Trustee's certificate hereon endorsed shall have been signed by such Trustee of said mortgage or deed of trust.

In Witness Whereof, the said Western Steel Corporation has caused this bond to be signed in its corporate name by its President or Vice-President, its corporate seal to be hereunto affixed, attested by its Secretary or Assistant Secretary, and the interest coupons hereto annexed executed in its behalf by the facsimile signature of its Treasurer, this first day of October A.D. 1910.

Western Steel Corporation,

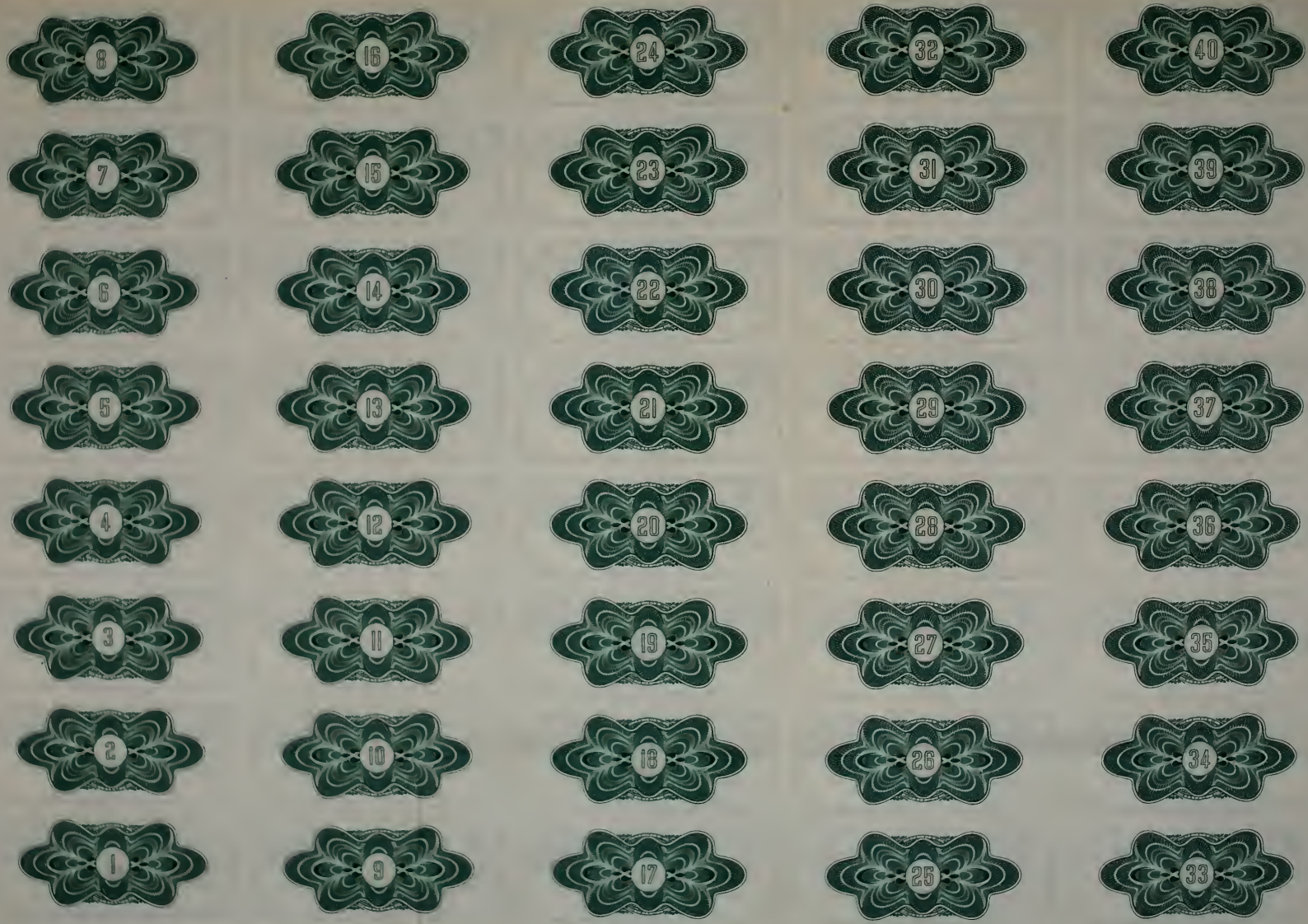
By [signature] President

Attest: [signature] Secretary

Cancelled by order of Referee
LESTER PUTCLIFFE
EDGAR AMES
Trustees in Bankruptcy of
Western Steel Corporation

$1000

SECURITY BANK NOTE COMPANY PHILA.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[Endorsed]: Statement of Agreed Facts. Filed in the United States District Court, Western District of Washington. Oct. 28, 1912. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [58]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

Order Authorizing Payment of Expenses of Publication of Notices of Sale.

The expenses of publication of Notices of Sale in the "Seattle Post Intelligencer" and "Seattle Daily Times" having been authorized and allowed by the Referee are hereby ordered to be paid, as follows:

CHECK NO. 260—The Post Intelligencer Co. $254.70

CHECK No. 261—The Times Printing Company of Seattle..... 226.00

Done in open court this 25th day of April, A. D. 1912.

C. H. HANFORD,
Judge.

Authorized:

JOHN P. HOYT,
Referee.

[Endorsed]: Order Authorizing Payment of Expenses of Publication of Notices of Sale. Filed in

the United States District Court, Western District of Washington. Apr. 25, 1912. A. W. Engle, Clerk. By B. O. Wright. [59]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—Cause No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

Order Directing Payment of the Sum of $7,000 to Metropolitan Trust Company.

It appearing that by the order confirming the sale of the assets of the bankrupt, entered herein on the 20th day of March, A. D. 1912, the purchaser, Metropolitan Trust Company, was required in addition to the purchase price of the said assets to deposit with the trustees herein the additional sum of Seven Thousand Dollars ($7,000), to be used in the payment of expenses of administration, taxes and prior labor claims, in the event the proceeds of the estate of the bankrupt should prove insufficient for said purpose, and that the trustees herein have in their possession sufficient funds belonging to the estate of the bankrupt wherewith to pay expenses of administration, taxes and prior labor claims without resort to the said sum of Seven Thousand Dollars ($7,000) deposited by Metropolitan Trust Company as aforesaid, and the repayment of the said sum having been authorized and directed by the Referee,

now therefore, it is

ORDERED that the trustees herein pay to Metropolitan Trust Company the sum of Seven Thousand Dollars ($7,000) by check drawn as follows:

CHECK No. 346 Bausman & Kelleher, attorneys for Metropolitan Trust Company.....$7000.00

The payment of the said amount to be made without prejudice [60] to the rights of the trustees herein, under and by virtue of the said order confirming sale of March 20th, A. D. 1912, to demand and receive from Metropolitan Trust Company the sum of Twelve Thousand Dollars ($12,000), or so much thereof as subsequent developments in the administration of the estate of the bankrupt may prove to be necessary to pay expenses of administration, taxes and prior labor claims, in the event of the proceeds of the estate of the bankrupt shall prove insufficient for that purpose.

Done in open court this 20th day of September, A. D. 1912.

EDWARD E. CUSHMAN,
Judge.

Authorized:

JOHN P. HOYT,
Referee.

[Endorsed]: Order Directing Payment of the sum of $7,000 to Metropolitan Trust Company. Filed in the United States District Court, Western District of Washington. Sep. 20, 1912. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [61]

[Memorandum Decision.]

United States District Court, Western District of Washington, Northern Division.

No. 4746.

In the Matter of THE WESTERN STEEL CORPORATION,

Bankrupts.

MUNN & BRACKETT, for Trustee.
BAUSMAN & KELLEHER, for Claimant.

Filed Feb. 8, 1913.

By the COURT:

In the month of January, 1911, the Western Steel Corporation borrowed the sum of $300,000 from the Metropolitan Trust Company of the City of New York and pledged $1,800,000 par value of a total issue of $2,000,000 of mortgage bonds as security for the payment of the loan at maturity.

On the first day of April, 1911, the Steel Corporation borrowed an additional $300,000 from the Trust Company and executed its promissory note in favor of the Trust Company for the sum of $600,000, payable on August 1, 1911. The entire issue of $2,000,000 of mortgage bonds was pledged to secure the payment of this loan and the note was signed by James A. Moore, president and principal stockholder of the Steel Corporation as guarantor. The note contained the following provisions, among others:

"The said company is hereby authorized, upon the nonpayment of any of the liabilities above

mentioned when due, to sell, assign and deliver the whole of said securities, [62] or any part thereof, or any substitutes therefor, or any additions thereto, or any other securities or property given unto, or left in the possession or custody of the said company by or for the undersigned, at any Broker's Board or at public or private sale, at the option of said company, without either advertisement or notice, which are hereby expressly waived.

If such securities or property are sold at public sale, the said company may itself purchase the whole or any part thereof, free from any right of redemption on the part of the undersigned which is hereby waived and released."

The loan was not paid at maturity and on the date of maturity the Trust Company notified the Steel Corporation by letter that if the note was not paid on or before Monday, August 28, 1911, the securities would be sold at public auction in the city of New York on the 30th day of August, 1911. Receipt of this note was acknowledged by the Steel Corporation under date of August 11, 1911. No part of the note was paid on or before the date mentioned, or at all, and on the 29th day of August, 1911, the bonds were advertised for sale in the "New York Evening Post," and on the morning of August 30th in the "New York Times" and "Wall Street Journal," and notices of sale were likewise mailed to the principal bond buyers, banking and financial corporations and firms, and individuals in the financial district of the city of New York. The

newspapers in which the sale was thus advertised are generally considered the best media for reaching bidders and buyers in the city of New York, one of them being the paper designated by the United States District Court in Bankruptcy for the Southern District of New York for the publication of notices of auction sales. The places of sale was the place designated by the general rules of the Supreme Court of the State of New York for public auction sales, and is the usual and proper place for [63] conducting such sales. The bonds were sold at a regular auction sale held weekly at that time and place for the sale of stocks, bonds and financial securities, and was largely attended by buyers of financial securities. The proceedings for the sale of these securities, the notice given, and the manner in which the sale was advertised and conducted were such as are customary, regular and usual in the sale of listed or known stocks, bonds and financial securities marketable in the city of New York. The bonds were bid in by the Trust Company for the sum of $25,000, it being the highest and best bidder, and no attack on the sale was ever made by the Steel Corporation, and no question as to the validity of the sale was ever raised, until after bankruptcy proceedings were instituted against the corporation.

On the 26th day of October, 1911, the Steel Corporation was adjudged a bankrupt in this court and the Trust Company presented its claim for the $2,000,000 bond issue, less the amounts received thereon, as a general creditor of the bankrupt corporation. The trustee and referee allowed the claim for the amounts

actually advanced by the Metropolitan Trust Company with interest, but rejected the balance of the claim on the ground that the Trust Company acquired no title to the bonds by reason of the sale above mentioned. The case is now here on a petition of the Trust Company for a review of the order and decision of the referee rejecting its claim.

The referee in bankruptcy rejected the claim based on the bond sale for two reasons—first, because the sale could not be upheld as a private sale, inasmuch as the pledgee became the purchaser, and, second, because it could not be upheld as a public sale, on account of the inadequacy of price and the want of sufficient notice of the time and place of sale. [64]

The Court finds itself unable to agree with this latter conclusion. The trustee in bankruptcy has only succeeded to the rights of the bankrupt, and can only urge such objections as were open to it prior to the adjudication. The contract under which the bonds were sold was made in New York and was subject to the laws of that State. It is admitted by the parties that the sale was conducted in the usual and customary manner and in full accordance with the laws of that State. To overturn such a sale for want of a notice neither sanctioned or required by law or usage would overturn many of the most important transactions of the business world. The fact that the notice was not sufficient in time to give prospective bidders time and opportunity to examine and inspect the properties behind the bonds, cannot change the rule. To allow sufficient time for that purpose would postpone the sale perhaps for months

and the expense attending such examination and inspection would be so great that no mere bidder at a public sale could afford to undertake the task. Furthermore, no such construction of the contract could have been contemplated by the original parties thereto. They were both presumably familiar with the laws and customs of the city of New York, and fully understood and contemplated that the bonds would be sold, just as they were afterwards sold, in case default was made in the payment of the loan.

Nor can the sale be set aside for mere inadequacy of consideration. Many authorities hold that mere inadequacy of price is not sufficient to justify the setting aside of a public sale in any case, and all the authorities agree that before a sale can be set aside on that ground alone, the inadequacy must [65] be so great as to shock the conscience and raise a presumption of fraud. The schedule and the report of the appraisers show that the properties owned by the bankrupt corporation are widely scattered, encumbered and largely unpaid for. Their value is uncertain and highly problematic at best. Suffice it to say on this branch of the case that no such inadequacy of price is shown as would shock the conscience or raise a presumption of fraud where it is conceded that no fraud was practiced or existed. The following cases fully support the conclusion of the Court:

Atlantic Trust Co. v. Woodbridge, 79 Fed. 844;
Same v. Same, 86 Fed. 975;
Morris v. East Side Ry. Co., 104 Fed. 109;
In re Mertens, 144 Fed. 822;

Farmer's Loan & Trust Co. v. Toledo, 54 Fed. 759;

Wheelright v. St. Louis M. O. & O. C. T. Co., 56 Fed. 164;

Fidelity Ins. Co. v. Roanoke Iron Co., 81 Fed. 439;

24 Cyc. 39 and cases cited.

The order of the referee is reversed, with instructions to allow the claim as presented.

[Endorsed]: Memorandum Decision. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 8, 1913. Frank L. Crosby, Clerk. E. M. L., Deputy. [66]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

Order Reversing Order of Referee upon Objections to Claim of Metropolitan Trust Company of the City of New York, and Allowing Such Claim.

This matter having, on the petition of Metropolitan Trust Company of the City of New York for the review of the order of the referee entered herein on the 1st day of April, 1912, come on to be heard before this court the 6th day of January, 1913, upon the record submitted and the statement of agreed facts filed by the parties herein, with the exhibits, papers

and evidence attached thereto and referred to therein; and the order of the referee on the trustees' objections to the claims of Metropolitan Trust Company, the certificate and return of the referee upon the petition for review, the petition of Metropolitan Trust Company for the review of the order of the referee upon the objection to the claims of Metropolitan Trust Company, statement of agreed facts, with exhibits, order authorizing payment of expenses of publication of notice of sale filed April 25, 1912, order directing payment of Seven Thousand Dollars ($7,000.00) to the Metropolitan Trust Company filed September 20, 1912, and the several bids received by the trustees in bankruptcy for the assets offered by them for sale, having been received in evidence, and no other evidence [67] being offered by either party, and the cause having been argued by counsel for the respective parties, and submitted to the Court for its decision, and the Court having considered the same, and being advised in the premises, and having made findings as stated in the Court's opinion filed herein, it is now

ORDERED, ADJUDGED AND DECREED BY THE COURT that the order of the Referee herein be and the same is hereby reversed in so far as it rejects and disallows the claims of Metropolitan Trust Company of the city of New York upon the bonds and note of Western Steel Corporation, and directs that said note be cancelled; and the proofs of claim of the Metropolitan Trust Company are hereby allowed in the sum of One Million Four Hundred Seventy-two Thousand Nine Hundred Ninety Dol-

lars ($1,472,990.00), upon the bonds of Western Steel Corporation after deducting the sum in which said bonds have been used in paying for the properties of the bankrupt purchased under the decree of this court, and in the sum of Five Hundred Eighty-two Thousand Four Hundred Fifty-seven Dollars ($582,457.00) upon the promissory note of the bankrupt attached to said Trust Company's proof of claim herein; and it is ordered that there be credited and indorsed by said trustees upon said note the amount of such dividends as may be paid upon the claim of Metropolitan Trust Company thereon.

Done in open court this 27th day of February, 1913.

CLINTON W. HOWARD,
District Judge.

O. K. as to form.

MUNN & BRACKETT.

[Endorsed]: Order Reversing Order of Referee upon Objections to Claim of Metropolitan Trust Company, and Allowing Such Claim. Filed in the United States District Court, Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [68]

In the District Court of the United States for the Western District of Washington, Northern Division.

Cause No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

Assignment of Errors in the Entry of the Order of February 27th, 1913, Re Claims of Metropolitan Trust Company.

Come now Lester Turner, Sutcliffe Baxter and Edgar Ames, trustees in bankruptcy of the Western Steel Corporation, on this 27th day of February, A. D. 1913, by their attorneys, Munn & Brackett, and say that the order of the District Court entered in the above cause on the 27th day of February, A. D. 1913, reversing the order of the Referee of April 1st, 1912, and directing the allowance of the claims of the Metropolitan Trust Company as filed, is erroneous and unjust in the following particulars to wit:

FIRST: Your trustees assign as error the entry of the order of February 27th, 1913, reversing the order of the Referee with instructions to allow the claims as presented.

SECOND: Your trustees assign as error the finding of fact set out in the opinion of the Court that the procedure adopted by Metropolitan Trust Company in the attempted foreclosure of the pledged securities, was legally sufficient to transfer the title of the said securities to Metropolitan Trust Company.

THIRD: Your trustees assign as error the finding of the Court in its said opinion that the sale of the said securities took place in accordance with the terms of the contract of pledge.

FOURTH: Your trustees assign as error the finding of the Court in its said opinion that the sale of the securities by Metropolitan Trust Company was conducted in the usual and customary manner and

in full accordance with the laws of the State of New York where the contract was made.

FIFTH: Your trustees assign as error the finding of the Court [69] in its said opinion that the parties to the notes upon which the said bonds were pledged as collateral, fully understood and contemplated that in case of default in payment of the loan the bonds would be sold just as they were afterwards sold.

SIXTH: Your trustees assign as error the finding of the Court in its said opinion that the inadequacy of the price upon the sale of the said securities was not such as to shock the conscience of the Court or raise the presumption of fraud.

SEVENTH: Your trustees assign as error the finding of the Court in its said opinion that the method of advertising the sale of the securities upon foreclosure of the pledge was sufficient to sustain the sale as a valid public sale.

EIGHTH: Your trustees assign as error the failure of the Court to find that the bonds of the bankrupt were unlisted securities having no known or market value in the commercial world.

NINTH: Your trustees assign as error the failure of the Court to distinguish between standard, known or listed securities and securities neither listed nor having a known or market value in the commercial world and its failure to find that the bonds of the bankrupt being unlisted securities and having no known or market value, could not be sold at public sale on foreclosure of the pledge except after the same had been advertised for such period of time

prior to the sale as would enable prospective bidders to investigate the value of the said bonds.

TENTH: Your trustees assign as error that the Court erred in assuming that the procedure adopted by Metropolitan Trust Company in the attempted foreclosure of the pledge, which procedure was admitted to be such as was customary in New York City in the sale on foreclosure of listed, standard or marketable securities, was legally sufficient to affect a valid public sale and transfer of title to the bonds of the bankrupt which were unlisted securities [70] having no known or market value in the commercial world.

ELEVENTH: Your trustees assign as error the finding of the Court in its opinion that the Metropolitan Trust Company could itself become a purchaser of the bonds of the bankrupt at the sale conducted by it for the inadequate sum of Twenty-five Thousand ($25,000.00) Dollars, and particularly at an alleged public sale of which possible bidders had less than twenty-four hours' notice.

TWELFTH: Your trustees assign as error the failure of the Court to find that the action of Metropolitan Trust Company in selling the bonds of the bankrupt to itself for the sum of Twenty-five Thousand ($25,000.00) Dollars at an attempted public sale held upon less than twenty-four hours' notice to the public was a wanton sacrifice of the securities and in fraud of the bankrupt.

WHEREFORE your trustees pray that said order of February 27th, 1913, be reversed.

MUNN & BRACKETT,
Attorneys for Trustees.

[Endorsed]: Assignment of Errors in the Entry of the Order of February 27th. Re Claim of Metropolitan Trust Company. Filed in the United States District Court, Western District of Washington. Feb. 27, 1913. Frank D. Crosby, Clerk. By B. O. Wright, Deputy. [71]

[Petition for, and Order Allowing, Appeal.]

In the District Court of the United States for the Western District of Washington, Northern Division.

Cause No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

PETITION FOR APPEAL FILED FEBRUARY 27, A. D. 1913, IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

To the Honorable CLINTON W. HOWARD, District Judge.

The trustees in bankruptcy of the Western Steel Corporation feeling themselves aggrieved by the order made and entered in this cause on the 27 day of February, A. D. 1913, by which said order the order of the Referee herein disallowing the claim of the Metropolitan Trust Company was reversed with instructions to allow the claim as presented, hereby appeal from said order to the United States Circuit Court of Appeals of the Ninth Circuit, for the rea-

sons specified in the Assignment of Errors which is filed herewith, and pray that their appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

MUNN & BRACKETT,
Attorneys for Trustees in Bankruptcy.

The foregoing petition is granted and the appeal allowed.

CLINTON W. HOWARD,
Judge of the District Court of the United States for the Western District of Washington, Northern Division.

[Endorsed]: Petition for Appeal. Filed in the United States District Court, Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [72]

Citation on Appeal [Copy].

United States of America to Metropolitan Trust Company of the City of New York, a Corporation, and Messrs. Bausman & Kelleher, Its Attorneys, Greeting:

You are hereby notified that in a certain case in bankruptcy in the United States District Court for the Western District of Washington, Northern Division, entitled "In the Matter of Western Steel Corporation, a Corporation, Bankrupt," cause No. 4746, an appeal has been allowed to the trustees in bank-

ruptcy therein, to the Circuit Court of Appeals of the United States of America, Ninth Circuit, from the order of the District Court entered on the 27th of February, A. D. 1913, reviewing and reversing the Referee's order of April 1st, 1912, and directing allowance of the claims of the Metropolitan Trust Company based upon its alleged ownership of Two Million ($2,000,000) Dollars First Mortgage Bonds of the Bankrupt and upon the promissory note of the Bankrupt. You are hereby cited and admonished to be and appear in said Court at San Francisco, California, 30 days after date of this citation, to show cause, if any there be, why the said order appealed from should not be corrected and speedy justice done the parties in that behalf.

Wit*nesses* the Honorable CLINTON W. HOWARD, Judge of the United States District Court for the Western District of Washington, Northern Division, this 27 day of February, A. D. 1913.

CLINTON W. HOWARD,
United States District Judge.

Service of the within citation and receipt of a true copy of the same is hereby acknowledged the 27th day of February, 1913.

BAUSMAN & KELLEHER,
Attorneys for Metropolitan Trust Co.

[Endorsed]: Citation on Appeal. Filed in the United States District Court, Western District of Washington. Feb. 28th, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [73]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify the foregoing 77 typewritten pages, numbered from 1 to 77, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause as is called for by the praecipe of the attorneys for the trustees and appellants, as the same remain of record and on file in the office of the Clerk of the said Court, with the exception of the copy of the Gold Bond in which the numbers differ, and that the same constitute the transcript of record on appeal from the order of the District Court of the United States for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

I further certify that the cost of preparing and

certifying the foregoing transcript is the sum of $37.90, and that the said sum has been paid to me by Messrs. Munn and Brackett, attorneys for trustees and appellants. [74]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 15 day of March, A. D. 1913.

[Seal] FRANK L. CROSBY,
Clerk. [75]

Citation on Appeal [Original].

United States of America to Metropolitan Trust Company of the City of New York, a Corporation, and Messrs. Bausman & Kelleher, Its Attorneys, Greeting:

You are hereby notified that in a certain case in bankruptcy in the United States District Court for the Western District of Washington, Northern Division, entitled "In the Matter of Western Steel Corporation, a Corporation, Bankrupt," cause No. 4746, an appeal has been allowed to the trustees in bankruptcy therein, to the Circuit Court of Appeals of the United States of America, Ninth Circuit, from the order of the District Court entered on the 27th of February, A. D. 1913, reviewing and reversing the Referee's order of April 1st, 1912, and directing allowance of the claims of the Metropolitan Trust Company based upon its alleged ownership of Two Million ($2,000,000) Dollars First Mortgage Bonds of the bankrupt and upon the promissory note of the bankrupt. You are hereby cited and admonished to

be and appear in said court at San Francisco, California, 30 days after date of this citation, to show cause, if any there be, why the said order appealed from should not be corrected and speedy justice done the parties in that behalf.

Witnesses the Honorable CLINTON W. HOWARD, Judge of the United States District Court for the Western District of Washington, Northern Division, this 27 day of February, A. D. 1913.

CLINTON W. HOWARD,
United States District Judge. [76]

Service of the within citation and receipt of a true copy of the same is hereby acknowledged the 27th of February, 1913.

BAUSMAN & KELLEHER,
Attorneys for Metropolitan Trust Co.

[Endorsed]: No. 4746. In the District Court of the United States for the Western District of Washington, Northern Division. In Bankruptcy. Citation on Appeal. Filed in the United States District Court, Western District of Washington. Feb. 28, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy.

[Endorsed]: No. 2257. United States Circuit Court of Appeals for the Ninth Circuit. Lester Turner, Sutcliffe Baxter and Edgar Ames, as Trustees of Western Steel Corporation, Bankrupt, Appellants, vs. Metropolitan Trust Company of the City of New York, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Received March 20, 1913.

F. D. MONCKTON,
Clerk.

Filed March 24, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

LESTER TURNER, SUTCLIFFE BAXTER and EDGAR AMES, as Trustees in Bankruptcy of Western Steel Corporation, Bankrupt, *Appellants,* *vs.* METROPOLITAN TRUST COMPANY, of the City of New York, a corporation, *Appellee.*	No. 2257

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANTS' BRIEF

ABSTRACT OF FACTS.

The facts involved in this appeal are as follows:
On August 1, 1911, Metropolitan Trust Company

was the holder of the note of the Bankrupt in the sum of Six Hundred Thousand ($600,000) Dollars then due. The note was secured by the pledge of the entire issue of Two Million ($2,000,000) Dollars, first mortgage bonds of the Bankrupt. (Transcript, page 18.) The pledge agreement (Transcript, page 50) authorized the pledgee upon default in the payment of the note, to sell the collateral at public or private sale without either advertisement or notice, which were by the terms of the pledge expressly waived. At any public sale of the collateral the pledgee was by the terms of the pledge agreement, entitled to become a purchaser. The bonds of the Bankrupt were not standard or listed securities and concerning their value or the properties covered by the trust deed securing the bonds, no definite information was possessed by the commercial world (Transcript, page 20, paragraph 6). All that can be said of their actual worth is disclosed in paragraphs ten (10), eleven (11) and twelve (12) of the Agreed Statement of Facts (See Transcript, pages 22 to 25) and the Reports of the Appraisers (Transcript, pages 29 to 43). A summary of the facts regarding the value of the bonds and the properties covered by them, set out in the Agreed Statement of Facts and in the Appraisers' Report, may be stated as follows:

The mortgage trust deed covered all the properties of the Bankrupt save personal property other than stock in the subsidiary corporation in which

title to the Graham Island properties was vested. Eliminating from the appraisers report of January, 10, 1912 (Transcript, page 35) all of the items of personal property except the corporate stock above mentioned, it appears that the quick sale for cash value of the assets covered by the mortgage was Three Hundred Sixty-six Thousand Thirty-five ($366,035) Dollars. As a going concern, the appraisers estimated that the steel plant which they had appraised at Ninety-nine Thousand Thirty-five ($99,035) Dollars would be worth at least Three Hundred Ninety-nine Thousand Nine Hundred Forty-two ($399,942) Dollars (Transcript, page 37) and if the plant was a going concern or a sufficient time was had for promotion and negotiation even without the plant a going concern, much higher prices could be secured for much of the outlying property (Transcript, page 43.) Thus it appears that the minimum value of the assets covered by the mortgage trust deed appraised after bankruptcy, when the project was discredited among buyers was Three Hundred Sixty-six Thousand Thirty-five ($366,035) Dollars and, even at that date was worth to one who could properly finance it a total minimum of Six Hundred Sixty-six Thousand Nine Hundred ($666,900) Dollars.

The pledgee gave due notice to the pledgor of intent to sell at public auction (Transcript, pages 18 and 19). An auction sale was conducted in

New York City at a proper place by reputable auctioneers and the proceedings taken as to advertisement, notice of sale and sale at auction were such as were customary, regular and usual in the sale of listed or known bonds or securities marketable in the City of New York (Transcript, page 20, paragraph 7). The bonds of the Bankrupt were not listed or marketable securities and their value or the properties covered by them was not known to the commercial world (Transcript, page 20, paragraph 6). The advertisement or notice to the public that the bonds would be sold at auction consisted of a notice published in the New York Evening Post, of the evening of August 29th, and in the New York Times and Wall Street Journal of the morning of November 30th. Notices of the sale of the bonds were also mailed to the principal bond buyers, banking and financial corporations, firms and individuals in the financial district of New York City. The sale took place at twelve o'clock, M., on August 30th, (Transcript, page 19, paragraph 5). The bonds were bid in by the pledgee for the sum of Twenty-five Thousand ($25,000) Dollars, which amount, less cost of sale was credited in reduction of the Six Hundred Thousand ($600,-000) Dollar note. Upon the bankruptcy of Western Steel Corporation, the appellee filed as an unsecured creditor, its claim in the sum of approximately Five Hundred Seventy-five Thousand ($575,000) Dollars, (Transcript, page 21, paragraph 8, also page 44),

asserting itself also to be the absolute owner of the Two Million ($2,000,000) Dollars of bonds of the Bankrupt. Upon sale of the assets of the Bankrupt, the Appellee urged its right to bid the entire Two Million ($2,000,000) Dollars face value of the bonds as the purchase price of the properties covered by the mortgage trust deed (Transcript, page 26, paragraph 13). The Trustees of the Bankrupt disputed the right of the Appellee to use the said bonds in bidding in any amount in excess of Six Hundred Thousand ($600,000) Dollars, the amount originally advanced by the appellee. The Order of Sale entered by the Referee limited the use of the said bonds in bidding to the sum of Six Hundred and Fifty Thousand ($650,000) Dollars without prejudice to the rights of appellee to later file its claim as legal owner of the said bonds to their full face value (Transcript, page 26). Upon sale of the assets of the Bankrupt, appellee purchased the property covered by the Mortgage Trust Deed for the sum of Six Hundred Forty-Seven Thousand ($647,000) Dollars, and was allowed to make payment of the same by the use of its bonds to that amount (Transcript, page 27). Thereafter the Trustees filed their petition asking for the cancellation of the original Six Hundred Thousand ($600,000) Dollar note of the Bankrupt and of the entire issue of bonds upon the ground that the proceedings taken by the appellee in the attempted foreclosure of its pledge were legally insufficient to vest the legal title to the

collateral in it free from its obligation to hold the same as pledgee and that the appellee, by the use of the bonds in the purchase of the Bankrupt's assets, had received payment upon the note in an amount equal to its original loan. Upon hearing before the Referee the Order of April 1, 1912, (Transcript, page 8) was entered directing the cancellation of the said Six Hundred Thousand ($600,000) Dollar note and the bonds. Upon petition for review to the District Court the Order of the Referee was upon February 27, 1913, reversed with instructions to allow the claims as filed (See Memorandum Decision, Transcript, page 64, Order, Transcript, page 69).

From the Order of the District Court of February 27, 1913, reversing the Referee's order and directing the allowance of the claims as filed, this appeal is taken.

SPECIFICATION OF ERRORS.

I.

The court erred in the entry of the Order of February 27, 1913, reversing the Order of the Referee with instructions to allow the claims as presented (Assignment of Errors, Transcript, page 72).

II.

The court erred in the finding of fact set out in the opinion of the court that the procedure adopted by Metropolitan Trust Company in the attempted foreclosure of the pledged securities, was legally

sufficient to transfer the title of the said securities to Metropolitan Trust Company (Assignment of Errors, Transcript, page 72).

III.

The court erred in the finding of fact set out in its opinion that the sale of the said securities took place in accordance with the terms of contract of pledge. (Assignment of Errors, Transcript, page 72.)

IV.

The court erred in the finding of fact set out in its said opinion that the sale of the securities by Metropolitan Trust Company was conducted in the usual and customary manner and in full accordance with the laws of the State of New York where the contract was made. (Assignment of Errors, Transcript, page 72.)

V.

The court erred in the finding of fact set out in its said opinion that the parties to the notes upon which the said bonds were pledged as collateral, fully understood and contemplated that in case of default in payment of the loan, the bonds would be sold just as they were afterwards sold. (Assignment of Errors, Transcript, page 73.)

VI.

The court erred in its findings set out in its said opinion that the inadequacy of price upon the sale

of the said securities was not such as to shock the conscience of the court or raise the presumption of fraud. (Assignment of Errors, Transcript, page 73.)

VII.

The court erred in its findings of fact set out in its said opinion that the method of advertising the sale of the securities upon foreclosure of the pledge was sufficient to sustain the sale as a valid public sale. (Assignment of Errors, Transcript, page 73.)

VIII.

The court erred in not finding as a fact that the bonds of the bankrupt were unlisted securities having no known or market value in the commercial world. (Assignment of Errors, Transcript, page 73.)

IX.

The court erred in not distinguishing between standard, known or listed securities and securities neither listed nor having a known or market value in the commercial world and in not finding as a fact that the bonds of the bankrupt being unlisted securities and having no known or market value could not be sold at public sale on foreclosure of the pledge except after the same had been advertised for such a period of time prior to the sale as would enable prospective bidders to investigate the value of the said bonds. (Assignment of Errors, Transcript, page 73.)

X.

The court erred in assuming that the procedure adopted by Metropolitan Trust Company in the attempted foreclosure of the pledge which procedure was admitted to be such as was customary in New York City in the sale on foreclosure of listed, standard or marketable securities, was legally sufficient to affect a valid public sale and transfer of title to the bonds of the bankrupt, which were unlisted securities having no known or market value in the commercial world. (Assignment of Errors, Transcript, page 74.)

XI.

The court erred in the finding of fact in its said opinion that Metropolitan Trust Company could become a purchaser of the bonds of the bankrupt at the sale conducted by it for the inadequate sum of Twenty-five Thousand ($25,000) Dollars and particularly at an alleged public sale of which possible bidders had less than twenty-four hours notice. (Assignment of Errors, Transcript, page 74.)

XII.

The court erred in not finding that the action of Metropolitan Trust Company in selling the bonds of the Bankrupt to itself for the sum of Twenty-five Thousand ($25,000) Dollars at an attempted public sale held upon less than twenty-four hours notice to the public, was a wanton sacrifice of the securities

and in fraud of the bankrupt. (Assignment of Errors, Transcript, page 74.)

ARGUMENT.

The duties and obligations imposed upon a pledgee by the common law, require that when he proceeds in the enforcement of the pledge agreement by sale of the collateral he must give reasonable notice to the pledgor specifying the time and place of sale in order that the pledgor may redeem, prior to the sale, or at least be present to see that the sale is fairly conducted.

31 *Cyc.* 873, paragraphs 3 and 4

The sale must be a public auction after due advertisement.

Idem. 878, paragraph B.

The pledgor may not purchase at his own sale.

Idem. 879, paragraph B.

These limitations which the common law has imposed upon the pledgee as safeguards against fraud and unfair treatment of the pledgor, may be modified and to some extent waived by the express agreement of the pledgor. Thus, it is settled, that the provision in the contract of pledge, that the pledgee may sell the collateral without notice to the pledgor is valid and binding. So also if the pledge agreement provides that the collateral may be sold at private rather than public sale, the stipulation is

valid. A provision that the pledgee may become the purchaser at a public sale if the sale is conducted in strict good faith and in accordance with the terms of the contract, is valid.

Good faith, that is, a fair and honest effort to sell the collateral for the highest price it will bring, in order thereby to wipe out or so far as possible reduce the pledge indebtedness is required of the pledgee by common law under the usual pledge agreement wherein the pledgor has waived none of the common law safeguards. The reason for the rule is that the pledgee in the enforcement of the pledge is acting in part as Trustee for the pledgor and is charged with a Trustee's obligation to protect the interests of the pledgor.

31 *Cyc.* 877, paragraph 6.

In the case at bar the pledgee was not merely Trustee for the pledgor in the usual sense and under the usual form of pledge, but was Trustee for a pledgor which had placed itself entirely in the power of the pledgee by the waiver of all of the common law safeguards, for the pledgee in this case had power to sell without notice or advertisement at public or private sale and at the public sale was authorized to become the purchaser. Moreover, in this case the collateral was the obligation of the pledgor itself. The pledge agreement was not the usual one where personal property or securities which are the obligations of third parties are pledged as collateral.

If the procedure taken by the pledgee in this case is upheld as legal and sufficient to vest in the pledgee legal title to the bonds discharged of the pledge obligation then without the bonds ever having left the possession of the pledgee and without any new consideration, by the fiction of a public sale held on less than twenty-four hours advertisement to the public, the pledgee will have increased the obligation which it holds against the pledgor from Six Hundred Thousand ($600,000) Dollars to Two Million Five Hundred Seventy-five Thousand ($2,575,000) Dollars.

An agreement by the borrower of Six Hundred Thousand ($600,000) Dollars by the terms of which, upon his failure to pay at maturity, the amount of his obligation should forthwith be increased to Two Million Five Hundred and Seventy-five Thousand ($2,575,000) Dollars, would not be upheld by any court as valid, especially where the borrower has become insolvent and the rights of other creditors are involved. We believe the procedure adopted by the pledgee in this case was as certain to reach that result as though the contract had specifically provided for the forfeiture and that as a means of cutting off he pledgor's equity in the collateral, the one method was as invalid as the other would have been.

WHERE THE PLEDGED COLLATERAL CONSISTS OF AN OBLIGATION OF THE PLEDGOR IN A GREATER

AMOUNT AND THE COLLATERAL IS PURCHASED BY THE PLEDGEE, HE SHOULD NOT BE ALLOWED TO ENFORCE IT AGAINST THE PLEDGOR IN AN AMOUNT GREATER THAN THE ORIGINAL PLEDGE OBLIGATION.

The grave injustice of allowing a pledgee to purchase the obligations of the pledgor at a sale conducted by him in the foreclosure of the pledge and to enforce the obligations so purchased to their full face value, has led some courts to hold that the pledgee can in no event collect more than the amount of his original loan. In these cases, moreover, no question is raised as to the regularity of the steps taken by the pledgee in conducting the sale.

Peacock vs. Phillips, 93 N. E. 415, Ill., 1910;
Knickerbocker Trust Company vs. Penacook Manufacturing Company, Circuit Court, N. H. 1900, 100 Federal 814.

In the Illinois case above cited, the note of the pledgor secured by mortgage in the sum of Four Thousand ($4,000) Dollars was pledged as collateral security for a loan of Twenty-five Hundred ($2,500) Dollars. Upon default the pledgee sold the collateral to the defendant Phillips, who, however, purchased with notice of the terms of the pledge. The opinion by Cartwright, J. uses this language:

"In this case there was a contract authorizing the bank to sell the Four Thousand ($4,000) Dollar note and trust deed at public or private sale, without advertising the same, or demanding payment, or giving notice, and with the right of the bank to

purchase at the sale, if made at any broker's board or any public sale. The bank, therefore, might have foreclosed the trust deed pledged for the payment of its note of Twenty-five Hundred ($2,500) Dollars, and could not have had a decree for any more than the amount due on such note, or it could elect to sell the collateral in accordance with the power given by the contract. In case of foreclosure, the equities between the parties would have forbidden an enforcement of the lien for more than the debt to the bank; and the question is whether that result could be accomplished by selling the note and trust deed, in pursuance of the agreement to one who had notice of the facts."

The opinion then reasons that a mortgage is not assignable and that a purchaser of the mortgage takes with notice of equities in favor of the mortgagor; that the purchaser here is in the same position as the pledgee would have been, had he purchased the note and mortgage. Continuing the opinion states:

"We do not see any good reason for saying that a mere grant of power to sell enabled the bank to confer a greater right upon the purchaser with full notice of the facts and circumstances and the extent to which the bank could enforce the obligation, than the bank would have had in case of foreclosure."

The exception noted at the end of the court's ouinion in favor of corporate bonds, is an exception to the doctrine announced by the court that the purchaser of a mortgage takes it with constructive notice of equities in favor of the mortgagor. It is not intended as stating an exception to the prin-

ciple announced in the case that as between pledgor and pledgee or one purchasing with notice, the equities in favor of the pledgor prevent the enforcement of the collateral to an amount beyond the principal obligation. The cases cited as supporting the exception in favor of corporate bonds merely hold that a bond being payable to bearer is a negotiable instrument and that a holder is not charged with notice of equities in favor of the obligor.

In *Knickabocker Trust vs. Penacook*, the pledgee acting in good faith and in conformity with the contract of pledge, sold the bonds at public auction and purchased the same as highest bidder. Held that he could enforce the same to the extent only of the original obligation. The court uses this language:

"The holding (of the bonds) originally being as collateral security, is now by virtue of the sale. The sale was sufficiently within what was contemplated by the mortgage contract arrangement to be treated as valid for purposes of maintaining this suit; but the mortgagee who was the Trustee and who now holds the bonds under the sale took them with full notice of all the equities and has no standing beyond the amount represented by the actual indebtedness. Holding it as collateral security and having taken the required steps to that end, the trustee may foreclose the mortgage for the purpose of perfecting and realizing upon his security, but the security cannot extend beyond the actual indebtedness. There will be judgment of foreclosure for the plaintiff, which foreclosure is for

the benefit of the actual indebtedness from the mortgagor to the mortgagee, and for the benefit of the intervening bond holders as well."

Contrary to the above doctrine see

Atlantic Trust Company vs. Woodbridge Canal and Irrigation Company, Circuit Court, N. D. Cal., 1897, 86 Federal 975 at 982.

Where the court, Morrow, J., uses this language:

"These bonds had been pledged to the interveners as security for certain materials furnished to the defendant corporation. I held that the interveners were entitled to be paid the amount pledged on the bonds. It is now claimed, however, that with respect to the bonds held by Buell and Company, one of the Interveners, the full face value of the bonds should be allowed to them as they were sold at public auction in accordance with the terms of the bonds and were bought in by Buell and Company. Without entering into a discussion of the question, it may be said that Buell and Company, having bought in the bonds held by them as pledge security, are entitled under the decision in *Wade vs. Railroad Co.*, 149 U. S., 327, to the full face value of the bonds. See also *Farmers' Loan and Trust vs. Toledo*, 54 Federal 759; *Wheelwright vs. U. S. Transportation Co.*, 56 Federal 164."

An examination of the cases cited as supporting the doctrine announced without discussion in the above case, shows that the authorities cited do not support the holding. In *Wade vs. Railway Co.*, 149 U. S. 327, the bonds were neither obligations of the pledgor nor were they purchased by the pledgee.

In *Farmers' Loan and Trust vs. Toledo* it is held

that the sale of Two Hundred and Ten (210) One Thousand ($1,000) Dollar bonds for the sum of Twenty Thousand ($20,000) Dollars and purchased by the pledgee pursuant to the terms of the pledge, was not void but at most voidable and that in any event the question could not be raised by the interveners, no complaint, on account of the sale having been made by the pledgor. The question upon which the case is cited is authority, was therefore, not properly before the court and was not passed upon. (See page 774.)

Atlantic Trust Co. vs. Woodbridge also relies upon

> *Wheelwright vs. St. Louis Transportation Co.*, Circuit Court E. D. La., 1893, 56 Federal 164.

From the facts stated in this case it is uncertain whether the obligations held as collateral under the pledge were the bonds of the pledgor, but it does appear that the bonds were not purchased by the pledgee (See page 165). It is stated that the pledge was made to the First National Bank of New York, which appears not to have been a party to the suit. The only discussion in the court's opinion regarding the enforcibility of the bonds to their full extent is as follows:

"As to the foreclosure of the pledge, it seems to have been foreclosed in a manner strictly legal. The fact that at the sale the bonds brought but little, there being no fraud shown can not impeach the

complaint's title. I think therefore, his title to the Two Hundred and Sixty-five (265) bonds which he bought at this sale was complete."

From the three cases last cited it appears that the judgment of the court in the case of *Atlantic Trust Company vs. Woodbridge,* respecting the enforcibility of the obligation of the pledgor purchased by the pledgee, is not sustained by the authorities cited and is not supported by discussion of principles involved. It is believed that the weight of authority and better reason is in favor of the rule contended for by appellants, that a pledgee who purchases the collateral obligation of the pledgor and seeks to enforce the same, should be limited in his recovery to the amount originally loaned. The appellees in this case have received value to that amount, for they were allowed by the Referee, to use the bonds held by them to the extent of Six Hundred and Fifty Thousand ($650,000) Dollars in the purchase of the properties covered by the bond issue.

THE PLEDGEE'S INTENT IN CALLING A SALE ON LESS THAN TWENTY-FOUR HOURS NOTICE MUST HAVE BEEN EITHER TO ACQUIRE TITLE TO THE COLLATERAL BY BARE LITERAL COMPLIANCE WITH THE POWER OF SALE OR WANTONLY TO SACRIFICE THE EQUITY OF THE PLEDGOR.

Where it is evident that the intent of the pledgor in selling the collateral was not in good faith, to

sell in a manner calculated to bring the highest price, but that his intention was to acquire legal title to himself in order to put himself in a stronger position for collection purposes, the sale will not be upheld as a valid sale in the foreclosure of the pledge.

Muhlenburg vs. Tacoma, 25 Wash., page 36, 64 Pacific, 925.

Thirty Thousand ($30,000) Dollars of warrants of the City of Tacoma were pledged to Independence National Bank of Philadelphia as security for a loan of Twenty-five Thousand ($25,000) Dollars, on which all except Eighteen Thousand ($18,000) Dollars had been paid at the date of the attempted foreclosure of the pledge. The pledgor had become insolvent. The City of Tacoma was disputing the validity of the bond issue and cases were pending in the Supreme Court of the State of Washington to determine the validity of the bonds. The pledgee following strictly the terms of the pledge had the warrants sold at public auction and became the purchase for the sum of Five Thousand ($5,000) Dollars. The President of the pledgee bank testified that the bonds were sold in accordance with a universal practice when a note was not paid to sell the securities protecting it in order to get title to the property so that the bank might be in a position to handle them to the best advantage. From this admission and the circumstances surrounding the case, the court found that the attempted sale of the

warrants was for the purpose of getting title to the warrants and not for the purpose of liquidating the pledge indebtedness. The court, White, J., after calling attention to the fact that the securities at the time of the attempted sale had no market value and that their value could be ascertained only after the litigation testing the validity of the bonds had been settled, and after reviewing authorities cited by the pledgee as sustaining the sale, uses this language (page 56):

"These are the cases cited by the appellant to sustain the alleged sale. In all these cases there was a market value to the thing sold at the time of the sale and the sale was for the purpose of liquidating the debt and actually realizing on the security.

"The power of sale must be exercised with a view to the interests of the pledgor as well as of the pledgee. The unfairness and inequitableness of this case consisted in attempting a sale when the pledgee knew there was no market value for the pledge, knew that he had to look to the pledged property alone for payment and knew that suits were pending to prove the pledge property of value far in excess of the amount of the debt for which they were pledged. Under such circumstances we think it was the duty of the pledgee to refrain from a sale of the pledged security until it was determined whether they were valid obligations or not. The Independence National Bank knew that it must get its money only out of the City of Tacoma upon these warrants, and that nothing could be realized from the insolvent pledgor, and that sale to itself would not add one dollar towards the payment of the debt. It would put the bank, however, in a position to receive almost twice its

debt, if by such sale, it could obtain title, and if the warrants, after litigation thereon, should prove to be valid obligations against the city. If the warrants were invalid, it would realize nothing; and this would be true whether it was the owner or not of the warrants, and whether there was a sale or not. There can be no pretense that there was any intention of realizing money by reason of this sale. The Bank had no purchasers in sight, and under the circumstances, could reasonably expect none.

* * * * * * *

"The Bank is in no way injured by the holding of this sale invalid, for it will receive in any event, its entire debt, interest and expenses and this is all it is equitably entitled to. Under the circumstances there appears to be no overpowering equity preponderating in favor of the appellant that would justify this court in placing the ownership of these warrants in his hands to the injury of the other creditors of the insolvent German-American Bank."

What is said in the Washington case regarding the forcing of a sale when the pledgee knows the securities have no market value, and that there cannot reasonably be expected to be anyone to bid against him is peculiarly applicable to this case. The Metropolitan Trust Company knew that the value of the bonds and the extent of the properties covered by the trust deed which secured them were unknown to the commercial world. The bonds were not listed securities on the New York Exchange. They had no market or known value. How could the pledgee, in the exercise of reasonable business judgment, expect that a notice published in the

newspapers less than twenty-four hours prior to the sale would invite other bidders, or if it did by accident come to the attention of other possible bidders, how could it be expected that any such possible bidders could, prior to the sale and within twenty-four (24) hours, ascertain the value of the bonds? Sold as they were, they would have been regarded as so much waste paper by any possible bidder other than Metropolitan Trust Company. No reasonable man could have expected an advertisement of public sale published on such short notice to have brought to the sale a single bidder. The pledgee in this case did not expect it. It did not want it. What it did want was to secure legal title to the bonds, thereby diminishing none of its security, but increasing the amount of the debt held by it against the pledgor from Six Hundred Thousand ($600,000) Dollars to Two Million Five Hundred Seventy-five Thousand ($2,575,000) Dollars. To attempt this by the fiction of a public sale held on less than twenty-four hours' notice, where no one knew or could ascertain the value of the securities sold, was gross fraud upon the part of the pledgee charged with a trustee's obligation to protect the interest of the pledgor by selling the collateral in such a way and by such reasonable advertisement as would return the highest price. Actual intent to defraud there might not have been, but the procedure adopted amounts to fraud in law. True, in the Washington case above cited it

was admitted by the President of the pledgee bank that the intent of the bank in conducting the sale was to acquire legal title. In the case at bar there is no such express admission, but no such admission is necessary. Actions speak louder than words, and the procedure adopted here shows upon its face that the only purpose of the pledgee in offering the bonds for sale upon twenty-four hours' notice was to secure legal title. It is past belief that the pledgee would have consented to the purchase of the bonds by a third party for any such inadequate consideration (1¼%) as that which it bid.

The Washington case cites and relies upon the case of

Morris & Whitehead vs. East Side Railway, 95 Federal, page 13,

where this language is used:

"The real character of the transaction shows through all this circumlocution. The German Savings & Loan Society was not seeking to realize upon its securities, but to effect a transfer of the title of the bonds held by it to Morris & Whitehead. The sale, if it can be so called, was not a cash sale, as advertised, except as to the Ten Thousand ($10,000) Dollars, which, when the amount involved is considered, appears to be too small a sum to have operated as an inducement for what was done. The debt of the Steels, except as to Four Thousand Nine Hundred and Seventy ($4,970) Dollars, was simply transferred to Morris & Whitehead. I am

satisfied that the solvency of these bankers was not an inducement for the transfer. The security for the debt was the bond. The German Savings & Loan Society was merely playing into the hands of Morris & Whitehead, and if the former has no pecuniary share in the title derived from the sale, yet its conduct has all the consequences of such an interest to the debtors whose property was sold. But whether the pledgee may buy at his own sale is not considered. It is enough to defeat the sale that it was contrived between the seller and buyer in order to get the pledgor's title at a sacrifice of his interest, with that result. I am of the opinion that the purchasers of these bonds are only entitled to a decree for the amount of the debts for which the bonds were pledged and interest and costs; and this conclusion is based upon the fact that the selling to Morris & Whitehead was prearranged between the parties, that it was contrived by them as a means of acquiring the property pledged and that it is immaterial whether the German Savings & Loan Society have any interest in the sale or not. In reaching this conclusion we assume from the earning capacity of the railway, as shown of what appears in the case, that the bonds have a value greatly in excess of the price bid for them at the sale. If this is so, it is unconscionable that the mortgagors, or, what is the same thing, other creditors, shall loose this excess by the expedient of this sale, while some Five Thousand ($5,000) Dollars of the original debt remains unsatisfied in the hands of the purchaser at the sale."

The last cited case was overruled by this court (see *Morris & Whitehead vs. East Side Railway*, 104 Federal 409), but the case is overruled upon the facts, not upon the law announced. The decision

on appeal leaves unaffected the doctrine announced that where the obvious intent of the pledgee was to secure title to the collateral, and not in good faith to liquidate the pledge indebtedness, the sale is invalid.

Perkins vs. Applegate (Ky. 1905), 85 S. W. 723.

"From the foregoing facts and circumstances and others proven in the case it is evident that appellant made no effort to dispose of this property with a view to benefit the appellees, but his purpose was to obtain the property for himself at the lowest possible price, regardless of the interest of those whom it was his duty to protect. This is contrary to law. It places a salutary restraint upon the pledgee to secure his fidelity and good faith, and he is held at his peril to deal fairly and justly with the pledgor. (Citing 2 Kent, 576-582; Benjamin on Sales, 35; 22 Am. & Eng. Enc. 885.)"

A SALE WITHOUT NOTICE TO THE PUBLIC IS NOT A PUBLIC SALE. THE FAIR CONSTRUCTION OF THE PLEDGE AGREEMENT IN THIS CASE IS THAT ADVERTISEMENT WAS WAIVED BY THE PLEDGOR ONLY IN CASE OF PRIVATE SALE.

The appellee in this case cannot rely upon the terms of the contract of pledge as excusing it from making reasonable advertisement of the public sale. The contract recites that the pledgee may sell at public or private sale, without either advertisement or notice, which are expressly waived. The reasonable and indeed the only construction of which this

clause is capable is that the waiver of advertisement has reference to advertisement in case of a private sale. The expression cannot refer to advertisement in case of public sale, because such a construction would involve a contradiction in terms. There can be no such thing as a public sale in the foreclosure of a pledge without notice to the public; that is, advertisement that such a sale will be held at public auction to which the public and probable purchasers are invited. If no advertisement of such a sale has been made it will be mere accident if other bidders than the pledgee are present. A sale so conducted is not a public sale, but a private sale held in a public place. The pledgor has safeguarded itself against the possibility of the pledgee buying the collateral at a sale to which other bidders have not been invited by the provision of the pledge agreement, which expressly limits the right of the pledgee, to purchase at a public sale. The contract does not authorize it to buy at private sale. Having no right under the contract to become the purchaser at a private sale, the pledgee in this case resorted to the fiction of a public sale, but was careful to see to it that the public and other bidders were not invited to be present by any reasonable notice or advertisement calculated to induce their attendance. We believe there is no case directly construing the terms of a pledge respecting advertisement such as is here involved, and holding that advertisement of public sale is waived; nor

is there any case which passes upon the validity of a pledge agreement which in express terms waives advertisement in case of public sale. We submit that the construction urged by the appellant is the only one which does not involve a conflict in terms and which does not lend itself to a harsh and unconscionable result. Courts have ever construed contracts of pledge in such a way as to safeguard the interests of the pledgor and to prevent the pledgee from taking unfair advantage of the pledgor.

Perkins vs. Applegate, Circuit Court of Appeals Ky. 1905, 85 S. W. 723.

The pledge agreement in this case provided that a pledgee "had full power to sell the collateral at any place in Covington, Kentucky, or elsewhere, at public or private sale, on non-performance of the above promise, and at any time thereafter, and without advertising the same or otherwise giving us any notice." The pledgee was authorized to purchase at a public sale. The pledgee, upon the maturity of the pledge obligation, advertised a public sale to be held on December 1st. On that date it was continued until December 11th. On conflicting testimony the court found that there had been no proper announcement made of the continuance. At the sale held on December 11th, with no one present, the auctioneer sold to himself, as agent for the pledgee. This language is used:

"It will be noted that the power of attorney appended to each of the notes authorized a private sale of the stock without advertisement or notice, but by clear implication precluded the holders of the notes from becoming the purchaser at such sale by expressly providing 'That in case of public sale, the holder may purchase without being liable for more than the net proceeds of the sale.' Unquestionably if the appellant had sold the stock at private sale to some *bona fide* third person as purchaser, the sale would have been good under this special contract. But having elected to sell at a public sale and holding the stock as pledgee and trustee, before he could acquire a valid title by purchase at his own sale, contrary to the general rule that no one can be seller and buyer at the same sale, he should be required to show that the sale was fairly made according to the terms of the contract at a 'public sale.'"

The right of a pledgee to sell at public sale without advertisement of the sale, where the contract of pledge authorizes public or private sale without advertising the same, is necessarily passed upon and denied in the foregoing case.

> *Tennent vs. Union Central Insurance Co.*, St. Louis Court of Appeals, Mo. 1908, 112 S. W. 754, at 758.

Where the pledge agreement authorizes sale "At any time or place without notice, at public or private sale," held that this did not excuse advertisement, and that although it was stipulated that the sale might be made at any place, a public sale must be made at a place accessible to the public, and that

a purported sale held in the offices of the insurance company which was the pledgee under the contract, was not a public sale. This language is used:

"The fact is, the policy was sold at auction by the Treasurer of the company, in the company's office at Cincinnati, and no public notice whatever was given of the intended sale. Now, the very idea of a public sale involved, of course, notice thereof to the public, to the end that the public shall be invited as bidders, and further that the sale be had in a public place to which the public, one and all, may resort for the purpose."

The case further holds that the provision authorizing sale without notice refers to notice to the pledgee, not notice to the public, citing other Missouri cases as sustaining the holding. The case is an authority in favor of the appellant's contention in two respects: First, it is an instance of the policy of the courts to adopt such a construction of the pledge agreement as will safeguard the interests of the pledgor, and, second, it is an illustration of the doctrine that a pledgee must deal fairly and honestly with the pledgor, no matter what may be the terms of the pledge contract. The expression in

Hiscock vs. Varick Bank, 206 U. S. 28, 51 Law Ed. 945, at page 952, Law Ed.,

that "In the absence of fraud the pledgee may buy at his own sale held without notice or demand or advertisement, when power so to do is expressly granted by the pledgor,"

cannot be intended by the court as passing upon the question whether a waiver of advertisement such as is involved in the terms of the pledge in this case is valid as to a public as distinguished from a private sale. The point appears not to have been urged in the case, and as the court finds that upon sale of the collateral its full value was obtained, and that no unfair advantage was taken of the pledgor, whatever may have been said by the court in reference to the validity of the waivers in the pledge agreement is dictum. Moreover, an examination of the cases cited by the court as sustaining the general expression above quoted shows that each of the cases cited concerned the validity of an agreement of the pledgee waiving notice to the pledgor. In none of the cases was the validity of a waiver of advertisement involved or passed upon.

If the pledge contract does not waive advertisement in case of public sale, or if it does waive advertisement, but such waiver is invalid, then the pledgee in this case was bound to give reasonable notice of the public sale. It needs no argument to convince one that a notice published in the newspaper less than twenty-four hours previous to the public sale was not a sufficient notice where the securities offered for sale are neither listed, standard, marketable nor of a known value. Such a notice was neither published a sufficient number of times to be reasonably calculated to be brought to the attention of any considerable number of buy-

ers, nor was it given a sufficient time in advance of the sale to enable a buyer to whose attention it is brought to investigate the value of the securities. Selling the bonds in this case upon less than twenty-four hours' notice was absolutely certain to result either in a willful sacrifice of the securities or in the acquisition of legal title for a trifling amount by the pledgee. It is inconceivable that the pledgee in this case would have permitted a third party to purchase these bonds which it had accepted as security for Six Hundred Thousand ($600,000) Dollars for the insignificant price of Twenty-five Thousand ($25,000) Dollars, and it is inconceivable that if the pledgee had actually intended in good faith to get the highest value out of the bonds, it would have called the sale on less than twenty-four hours' notice. Its only purpose and expectation in conducting the sale as it did must have been to acquire title to the securities at a small price, and thereby strengthen its position for collection purposes without losing any of its security.

THE PLEDGEE IN THIS CASE WAS CHARGED WITH A TRUSTEE'S OBLIGATION TO GET THE HIGHEST CASH VALUE OUT OF THE COLLATERAL. IF IT FAILED TO ACT REASONABLY AND FAIRLY IN THE CONDUCT OF THE SALE WITH THIS PURPOSE IN VIEW, NO MATTER WHAT THE TERMS OF THE PLEDGE AGREEMENT, THE SALE IS INVALID.

Foot vs. Utah Commercial Bank, 54 Pacific 104.

Where certain corporate stocks were pledged as security for a note of Eight Thousand ($8,000) Dollars under an agreement that the pledgee, on default, might sell at public or private sale, and the pledgee, without notice or advertisement of any sort, pretended to sell at auction at the front door of its bank the stock pledged, and purchased the same for an amount sufficient to discharge the principal obligation, but at less than one-half of the value of the stock. The court, in holding the sale invalid, uses the following language:

"No doubt the terms of the contract governed the rights of the parties as to the time and place and notice of sale, and should be strictly pursued without evasion or deception. The officers of the bank were empowered to sell at public or private sale. They choose to make the sale public, and were therefore required to conform to the rules governing public sales so far as publicity was concerned. This they did not do. The power of sale must be exercised with a view to the interest of the pledgor, as well as the pledgee, and the sale should not be forced for barely sufficient money to secure the payment of the debt when the securities are known to be more than double the value of the debt. The pledgee in whom such an authority to sell is vested must exercise it under a trust for the debtors' benefit, as well as his own. The sale must be fair and the contract must be construed benignantly for the debtors' interest as well as that of the pledgee." (Citing Colebrook, Collateral Securities, Sec. 118.)

* * * * * * *

"It is evident to our minds that in the manipu-

lation and conduct of this sale, and in the purchase of the stock, the bank did not exhibit that fair, benignant, strict good faith and reasonable degree of effort and diligence that was justly required in order to secure and protect the interest of the party who entrusted it with the power."

The foregoing case relies upon

Montague vs. Dawes, 14 Allen 373,

where the following language is used:

"One who undertakes to execute a power of sale is bound to the observance of good faith and a suitable regard for the interest of his principal. He cannot shelter himself under a bare literal compliance with the conditions imposed by the terms of the power. He must use a reasonable degree of effort and diligence to secure and protect the interest of the party who entrusted him with the power. A stranger to the proceedings, finding them all correct in form and purchasing in good faith, may not be affected by his unfaithfulness, but whenever his proceedings can be set aside without injustice to innocent third parties, it will be done upon proof that they have been conducted in disregard of the rights of the donor of the power. When a party who is entrusted with a power to sell attempts also to become the purchaser he will be held to the strictest good faith and the utmost diligence, for the protection of the rights of his principal. If he fail in either he ought not to be permitted thereby to acquire any irrevocable rights which he can set up against a party whose interest he has sacrificed."

Laclede National Bank vs. Richardson, Mo. 1900, 56 S. W. 1117.

Where notes of the face value of Forty Thousand ($40,000) Dollars were pledged to secure a loan of Twenty Thousand ($20,000) Dollars, which at the time of the attempted foreclosure of the pledge had been reduced to Five Thousand ($5,000) Dollars. The pledge agreement provided that the pledgee might at public or private sale, or otherwise at its option, without notice, and should have the right at any such sale to purchase the pledged property. Notice of the sale was given to the pledgor and advertisement thereof made in a daily newspaper on the 15th, 16th, 17th and 18th days of February. The sale took place at eleven o'clock on February 19th. The sale was advertised to take place at the front door of the court house. The weather being disagreeable, those present repaired inside the glass storm doors of the entrance. The collaterals were bid in by the bank for the sum of Eight Thousand Eight Hundred and Twenty-five ($8,825) Dollars. There were three or four bidders at the sale. The collaterals were sold for about one-fifth of their actual value. In holding the sale invalid the court uses this language:

"Neither did the bank exercise a sound discretion in selling the securities when only three or four bidders were present and the weather so inclement that the parties in attendance were compelled to retire within the glazed storm doors of the court house, and there, out of public view, sell notes and mortgages having a face value of Forty Thousand ($40,000) Dollars and upward to itself for

about one-fifth of the actual value of such securities, a sum so grossly inadequate that the mere statement shows there must have been some mismanagement on the part of the pledgee. While it is true as a general rule that such sales will not be set aside for mere inadequacy of price, providing proper diligence was used by the Trustee in selling, yet where, as in this case, the weather was so inclement that those present were compelled to withdraw inside the storm doors of the court house, the bidders so few and the sum offered so low, the bank, in the exercise of a sound discretion, should have adjourned the sale until such time as the same could have been made under more favorable circumstances. Having failed to do so, the sale might for that reason have been set aside. In discussing the duty of the Trustee in adjourning a sale where there were only a few bidders and the sum offered inadequate to the value of the property, Perry, Trusts, 4th Ed., Sec. 602, says: 'If an adjournment of the sale is not prohibited by the power, the donee of the power may adjourn the sale to another time. Such power is implied. Of course, it is a discretionary power. It must be exercised in good faith. It may be the clear duty of the Trustee to adjourn the sale, and an evidence of bad faith not to adjourn it, as if there are few or no purchasers, and the bids are very low and inadequate to the value of the property.' Having power under the exercise of a sound discretion, it was the clear duty of the bank to adjourn the sale in order to prevent a sacrifice of the securities and obtain a fair price therefor. (See Jones, Mortgages, 2nd Ed., Sec. 1873.) The trust relation occupied by the bank toward the pledgor made it encumbent upon the former to obtain the best possible price and to use every reasonable means to obtain the full value of

the pledged property. The conditions of the weather and the absence of any considerable number of bidders rendered an adjournment necessary in order to prevent a sacrifice of the securities. In view of the character of the securities sold consisting of numerous notes, secured by sundry deeds of trust on different lots of land, we do not think the bank exercised a proper discretion in selling on four days' notice. The notice given was wholly inadequate to enable prospective buyers to investigate into the value of the securities offered. In the sale of the collaterals in question the amount to be realized therefrom, is governed to a great extent at least by the value of the property embraced in the deeds of trust securing the same. Consequently, time and opportunity should have been given for an examination of the notes and property covered by the deeds of trust securing the same. It was expecting too much within the four days given to examine all these matters; and it certainly cannot be claimed any prudent person would have sold similar securities on such short notice, owned absolutely by himself."

The above case is cited and quoted with approval by Jones on Pledges and Collateral Securities, page 682, Sec. 635a, where this language is used:

"Even in case the power of sale provides that the pledgee may purchase at the sale, this will be held invalid if the sale was not advertised and was conducted without regard for the pledgor's interest."

Clark vs. Simmons, Massachusetts 1890, 23 N. E. 108.

Where, upon foreclosure of mortgage under

power of sale, the mortgagee purchased the property for at least Two Hundred ($200.00) Dollars less than its fair value, the court (Knowlton, J.), in holding the sale invalid, used the following language:

"It has repeatedly been held in this commonwealth and elsewhere that a mortgagee who attempts to execute a power of sale contained in the mortgage is bound to exercise good faith, and to use reasonable diligence to protect the rights and interests of the mortgagor under the contract. (Citing cases.) If he fails to do his duty in this respect, a mere literal compliance with the terms of the power will not render the sale valid against the mortgagor in favor of one charged with knowledge of the delinquency, although it may be sufficient if the purchaser is a stranger who buys in good faith. In determining whether in a particular case a mortgagee has acted in good faith, and with a due regard for the interests of the mortgagor, the nature of his authority must be considered. He has a right, after giving the prescribed notices, to have the mortgaged property sold at auction for the payment of his debt. It is his duty for the benefit of the mortgagor whom he represents to so act in the execution of the power as to obtain for the property as large a price as possible. Ordinarily the parties stipulate in the mortgage what kind of notices of the sale shall be given, and ordinarily a mortgagee is not required to give a notice of a different kind. So far as the mortgage leaves him a power of selection of methods of giving notice and making the sale, he is to act reasonably and exercise a sound discretion. The contract implies that, upon notice prescribed, an auction sale can be had; that is, that bidders will be attracted, so that the property can be sold. A

sale at auction necessarily involves the presence of one or more persons who are willing to buy. If the notices given fail to bring such, a power to sell at auction cannot be executed. If the mortgagee is not authorized to purchase and no bidders are present, it is quite obvious that no sale can be made. And if the only person who will buy at all will offer only a small part of the well known value of the property, the conditions which under the contract are impliedly essential to the execution of the power are wanting, and it is the duty of the mortgagee either to abandon his attempt to sell or to adjourn the sale until he can obtain the presence of bidders. Good faith and a reasonable regard for the interest of the mortgagor will not permit him to make a sale when no one will offer him a price which an owner could reasonably think of accepting, if he were obliged to sell the property at a day's notice for what it would bring. In such a case, where the notices given have failed to accomplish the purpose which the contract contemplated that they would accomplish, it is the duty of the mortgagee, if he would make a sale properly, to represent not only his own right to have the estate sold for his benefit, but also the right of the mortgagors to have an auction sale such as both parties must be presumed to have contemplated by their contract, and to get for the property as much as it can reasonably be made to bring. Under such circumstances he should do what a reasonable man would be expected to do to accomplish that result. A failure to do that would be evidence of a want of good faith; and such a neglect without an active purpose to defraud would invalidate the sale unless it was made to a stranger who bought in good faith."

Hagen vs. Continental National Bank, Mo. 1904, 81 S. W. 177.

The pledge agreement provided that the shares

of stock pledged as collateral might be sold by the pledgee at public or private sale, with or without notice, at such place and on such terms as the pledgee might deem best, with the right to purchase at any such sale. The bank without notice or advertisement attempted to sell the stock on the Merchant's Exchange and became the purchaser for the sum of Five Thousand ($5,000) Dollars. The stock appears to have been worth approximately Thirty Thousand ($30,000) Dollars. In holding the sale invalid the court uses this language:

"In view of these just and well settled principles of equity, it must be held that under the power given the bank, (the defendants in this case, to sell at public or private sale, with or without notice, it still remained its duty to make the sale fairly and with a view to make the securities sell to the advantage of the pledgor, the plaintiff herein, as well as its own interest. This trust, broad and ample as it was, was not intended as a power of attorney to go through a meaningless form by which plaintiff's stock was to be sacrificed without any regard to fairness."

* * * * * * *

"It requires little discrimination to see that this was a more unreasonable and unfair exercise of power conferred to sell at public sale. It cannot be doubted that defendant was attempting to make what it considered would be a compliance with the power to sell at public sale, and it seems to us that no one can fail to condemn it as inequitable and unjust to plaintiff and a ruthless sacrifice of his stock. Moreover, if the bank intended to execute the power to sell at a public sale, as all the evidence

tends to show, it was bound to pursue the methods ordinarily adopted in making sales, and such sale presupposes a sale at a public place—a place to which the public can have access. Such a place the Merchants' Exchange, from which the public is barred, is not."

* * * * * * *

"The result was such as can always be anticipated under such circumstances. The stock which the bank took as security for over Twenty Thousand ($20,000) Dollars indebtedness sold for Five Thousand ($5,000) dollars. The Circuit Court was clearly right in setting aside the sale, and we have no doubt whatever of the jurisdiction of the court of equity to avoid such a sale."

Colebrook on Collateral Securities, Sec. 118.

"Such a power (power to sell) given by contract, however, so far as it enables the pledgee to extinguish the right of the pledgor to redeem, will, as in other contracts affecting equities of redemption, be construed favorably for the interest of the pledgor so far as it is consistent with the rights of the pledgee. The power of sale must be exercised with a view to the interest of the pledgor, as well as pledgee, and the sale must not be forced for barely enough money to secure the payment of the debt."

2 Perry on Trust, 4th Ed., Sec. 602o.

"Trustees and mortgagees in the execution of their power must use the utmost good faith towards all parties in interest. This proposition cannot be too strongly stated and enforced. They must act impartially for every person who has any rights in the estate."

* * * * * * *

"They must use every effort to sell the estate under every possible advantage of time, place and

publicity. They must exercise every discretion, so far as they have any, in an intelligent and reasonable manner."

Idem, 602x, regarding the exercise of a power of sale by a Trustee.

"They are scrutinized by courts with great care and will not be sustained unless conducted with all fairness, regularity and scrupulous integrity."

* * * * * * *

"If publicity of the sale is not given, or if the proceedings are in any way contrary to justice or equity, the sale will not be allowed to stand."

THE INADEQUACY OF PRICE IN THIS CASE IS SO GREAT AS TO CONCLUSIVELY PROVE LACK OF GOOD FAITH ON THE PART OF THE PLEDGEE IN THE CONDUCT OF THE SALE.

While the rule is generally stated that mere inadequacy of consideration will not avoid the sale, this must be taken with the qualification that the inadequacy must be so great as to shock the conscience of the court or indicate a wanton disregard of the rights of the pledgor in the conducting of the sale. That the inadequacy may be so gross as to raise the presumption of fraud, is stated in

Hiscock vs. Varick Bank, 206 U. S. 28, 51 Law Edition 945, at 952.

where the following language is quoted from the opinion of the lower court, and approved:

"Doubtless the pledgee cannot avail himself of his authority, however unlimited, to sacrifice the

property wantonly or to purchase it himself at a valuation so inadequate as to suggest fraud."

If there has ever occurred a case where the inadequacy of price paid indicated fraud or want of good faith toward the pledgor in the proceedings incident to the sale, we believe this to be the case. Here Two Million ($2,000,000) Dollar first mortgage bonds, which four months previously the pledgee had regarded as of sufficient value to accept as security for a loan of Six Hundred Thousand ($600,000) Dollars, were at public sale, on less than twenty-four hours' notice to the public, bought in by the pledgee for Twenty-five Thousand ($25,000) Dollars, or one and one-fourth per cent. of their face value. The only evidence of the actual value of the property covered by the bond issue is the report of the appraisers in bankruptcy, from which it appears that if we accept the minimum value, placed upon it by the appraisers as the quick sale for cash value after bankruptcy had intervened and the plant had ceased to be a going concern, the properties were worth a minimum of Three Hundred Sixty-six Thousand Thirty-five ($366,035) Dollars. While as a going concern in the hands of a company strong enough to finance it adequately, the same properties were worth a minimum of Six Hundred Sixty-six Thousand Nine Hundred ($666,900) Dollars. This valuation was made after the Western Steel Corporation had become a defunct concern, and after the project had become discredited in the eyes of the

public by the bankruptcy proceedings. If the properties were worth that amount in January, 1912, they were worth at least that amount at the date of the attempted sale by the pledgee. Moreover, the pledgee, who, by the terms of the order of the sale in bankruptcy was authorized to bid the bonds as purchase price of the assets covered by the mortgage trust deed to the amount of Six Hundred Fifty Thousand ($650,000) Dollars, did in fact bid them to the extent of Six Hundred Forty-seven Thousand ($647,000) Dollars. Why the pledgee should have been willing to bid Twenty-five Thousand ($25,000) Dollars only of its indebtedness at the attempted sale of the collateral, but was willing to bid Six Hundred Forty-seven ($647,000) Dollars, seven months later at a sale in bankruptcy, seems to require explanation. It may have been because the attempted sale on foreclosure of the pledge was held on less than twenty-four hours' notice to the public, while the sale in bankruptcy was properly advertised and conducted in good faith and the appellee had reason to fear that if it did not bid at least Six Hundred Forty-seven Thousand ($647,000) Dollars for the properties, some other purchaser would do so.

Fidelity Insurance Company vs. Roanoke Iron Co., 81 Federal 439,

will probably be relied upon by the appellee as an authority contrary to the position taken by appellants in this case. In that case it appears that

twelve of the One Thousand ($1,000) Dollar bonds of the Roanoke Iron Company were pledged to one Gwinner as security for a loan of Five Thousand ($5,000) Dollars. The pledge agreement authorized sale at public or private sale without advertisement or notice. Whether advertisement was made does not appear from the opinion, nor does it appear at what price the pledgee purchased the collateral. It is plain, however, that the sale, such as it was, was made at the request of the Secretary of the pledgor company. The only question involved was, whether the pledgee had the right to become the purchaser, and whether, as such, he can enforce the bonds to their full amount. The regularity of the sale appears not to have been questioned. There is no showing as to the value of the bonds, and at whatever price they may have been purchased, there is no intimation in the opinion that the bonds at the sale did not bring their full value.

Atlantic Trust Co. vs. Woodbridge Canal Co., 86 Federal 975,

relied upon as an authority by the appellee, merely decides that where the pledgee purchases the bonds of the pledgor at the sale held on foreclosure of the pledge, it is entitled to enforce them to their full face value. No question was raised or discussed in the case regarding the regularity of the sale or the adequacy of the price paid by the pledgee.

Farmers' Loan and Trust Co. vs. Toledo Co., 54 Federal 759,

relied upon by the appellee as an authority, is not

in point. From the opinion (page 774) it appears that the bonds sold for approximately ten per cent. of their face value. As to the actual value of the bonds nothing appears in the opinion of the court. The case further decides that any question as to the purchaser's title to the bonds on account of inadequacy of price or irregularity in the sale cannot be raised by the intervener, Young. It affirmatively appears on page 773 of the opinion that the pledgor has never controverted or disputed the bank's title and ownership of the bonds.

In re Mertens, 144 Federal 818,

which may be cited as an authority favoring the appellee, holds that a pledgee, even after bankruptcy of the pledgee, may foreclose his pledge by sale of the collateral. Two life insurance policies were sold and bought in by the pledgee. No testimony was offered to show that the policies were actually worth more than the amount bid. (See page 821.) The regularity of the sale in other respects was not questioned. The court therefore found no ground for setting aside the sale.

The case was appealed to the United States Supreme Court and is reported *sub nomine*.

Hiscock vs. Varick Bank, 206 U. S. 28, 51 Law Ed. 945,

in which case the court reaches the conclusion that upon the sale held by the pledgee, the policies pledged as collateral brought their full value, and

that at any rate nothing upon the face of the record justified a charge of fraud in the management of the sale on account of inadequacy of price received.

Farmers' National Bank vs. Venner, Mass. 1906, 78 N. E. 540,

relied upon by the appellee as an authority in its favor, is distinguishable from the case at bar in the fact that the bonds involved in the case were the obligations of a third party, and there was no fraud or irregularity in the sale other than the charge that the price paid for the bonds was inadequate. It does not appear from the opinion what price was received for the bonds upon the sale. It further appears that the defendant, though having information of the sale shortly after it took place, took no steps to set the same aside until nearly six years afterward.

Cases may be cited by the appellee upholding a sale of pledged collateral where the price for which the pledgee purchased the collateral appears to have been inadequate, but all such cases are distinguishable from this case either by the fact that the collateral was not the obligation of the pledgor, by the fact that the regularity of the sale could not be questioned, or if questioned was not subject to attack by an intervener, or by the fact that no showing was made that the price paid by the pledgee was less than the actual value of the collateral. We confidently assert that no case can be cited involving in its facts all of the elements which are present

in this case, namely: A sale at public auction of bonds which were not standard or listed securities, and which had no market value, on less than twenty-four hours' notice to the public; a failure to adjourn the sale to a later date when it appeared that no other bidders were present; the purchase by the pledgee for the sum of Twenty-five Thousand ($25,000) Dollars, or one and one-fourth per cent. of their face value, of the bond issue, which was the obligation of the pledgor, where four months previously the pledgee had regarded the said bond issue as sufficient security for a loan of Six Hundred Thousand ($600,000) Dollars, and where from the only evidence in the case—the reports of the appraisers—it appears that the actual value of the property securing the bonds was, on a quick sale for cash basis, after bankruptcy, at least Three Hundred Sixty-six Thousand ($366,000) Dollars, and that in the hands of one able to finance the project, *i. e.*, any purchaser other than a speculator, the property was worth at least Six Hundred Sixty-six Thousand ($666,000) Dollars; the result that by the fiction of a public sale the pledgee, bound to a trustee's obligation to protect the pledgor in the sale, increased his demand upon the pledgor from Six Hundred Thousand ($600,000) Dollars to Two Million Five Hundred Seventy-five Thousand ($2,575,000) Dollars without any change in his security.

We believe that plain justice and ordinary honesty on the part of the pledgee required it to give

public notice of the proposed sale more than twenty-four hours in advance thereof, and in any event to adjourn the sale to a later date when it appeared that no other bidders were present. To fail in these respects was in violation of its duty as a trustee charged with protecting the interest of the pledgor as well as its own interest, in getting the highest price obtainable out of the collateral, and betokened an intent, not to be guided by its duties as such trustee, but to acquire legal title to the collateral at the smallest possible price to itself, in total disregard of the rights of the pledgor, in order to put itself in a more advantageous position for collection purposes.

Such a harsh and unfair result reached by the methods resorted to in this case, we submit, is contrary to elemental principles of justice and fair dealing among men. The claims of appellee as filed so far outrank in amount the total of all other unsecured claims that unless expunged they will be entitled in dividends to practically all of the surplus funds of the estate (approximately Ten Thousand ($10,000) Dollars), other creditors will get practically nothing. We respectfully submit that the case should be reversed, with instructions to expunge the claims.

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Attorneys for Appellants.